THE

LAW OF EVIDENCE

THE INDIAN EVIDENCE ACT

(I OF 1872)

BY

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PREFACE.

THIS edition has been thoroughly and carefully revised and brought up to date.

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D. K. T.

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PREFACE TO THE FIRST EDITION.

THE Indian Evidence Act is based upon the English law of evidence modified to suit the requirements of this country. It consists of a number of abstract principles In this book, which is mainly intended for students, the object, meaning and principle of every section are lucidly explained.

The commentary under each section is divided into two parts Comment and Cases In the Comment the provisions of a section are carefully explained and elucidated in the light of leading Indian and English decisions The provisions of the Act have been compared with the English law of evidence wherever they differ from it

In Cases the facts of important decisions have been given to illustrate the meaning of a section To the student they will serve as illustrations fixing the provisions of the Act firmly in his mind. The cases are arranged, where practicable, into cognate groups, each group elucidating a clause of the section.

The Summary of the provisions of the Act will give to the beginner a bird's-eye view of the whole Act To one who has mastered the subject it will be useful for revision when examination is at hand.

The Appendix contains questions set at the various law examinations held in different Presidencies They will enable the student to rivet his attention on portions demanding special care.

Finally, it may be observed that a critical study of this book alone will enable a student to tackle any question set by a sensible examiner, and will also impart to him a sound knowledge of the law of evidence.

R. R.
D. K. T.

June, 1916.

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THE

LAW OF EVIDENCE.

THE INDIAN EVIDENCE ACT.

ACT 1 OF 1872.

Received the G.-G.'s assent on the 15th March, 1872.

Preamble

WHEREAS it is expedient to consolidate, define and amend the law of Evidence: It is hereby enacted as follows:—

COMMENT.

The object of a preamble of an Act is to indicate what, in general terms, was the object of the Legislature in passing the Act. The preamble here shows that the Evidence Act is not merely a fragmentary enactment, but a consolidatory one, repealing all rules of evidence other than those saved by the last para of section 2. The Indian Evidence Act does not contain the whole law of evidence governing this country.[1] It is not exhaustive of the rules of evidence.[2]

The Act reduces the English law of evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India. It is, in the main, drawn on the lines of the English law of evidence.

PART I.—RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called the Indian Evidence Act, 1872.

Extent.

It extends to the whole of British India, and applies to all judicial proceedings[1] in or before any Court,[2] including Courts-martial, other than Courts-martial convened under the

[1] *In re Rudolf Stallmann*, (1911) 39 Cal. 164

[2] *Re Annati Muthiriyan*, (1915) 39 Mad 449

Army Act, but not to affidavits[3] presented to any Court or officer, nor to proceedings before an arbitrator[4]; and it shall come into force on the first day of September, 1872.

Commencement of Act

COMMENT.

The Evidence Act extends to the whole of British India. 'British India' means the territories vested in His Majesty the King-Emperor by the 21st and 22nd Vic. c. 106, s. 1, with the exception of the Straits Settlement, which, under the provisions of the 29th and 30th Vic. c. 115, ceased to be part of India.

The Indian Evidence Act applies to all judicial proceedings before (*a*) any Court, or (*b*) a native Court-martial (Act XI of 1911). It does not apply to (*a*) affidavits, and (*b*) proceedings before arbitrators.

The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not: whether a certain matter requires to be proved by writing or not: whether certain evidence proves a certain fact or not: that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it.[1]

1. **'Judicial proceedings.'**—An enquiry in which evidence is legally taken is included in this term.[2] An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but, even a Judge, acting without such an object in view, is not acting judicially.[3] An inquiry about matters of fact, where there is no discretion to be exercised and no judgment to be formed but something is to be done in a certain event as a duty, is not a judicial but an administrative inquiry. Proceedings before a Magistrate under s. 88 of the Criminal Procedure Code are not judicial proceedings under s. 4 (*d*) of that Code.[4] Simi[illegible] ate not authorised to conduct a [illegible] a Collector under the Land Ac[illegible] eedings.

2. **'Court.'**—This word includes all persons, except arbitrators, legally authorised to take evidence (s. 3). Thus, a committing Magistrate is a 'Court' within the meaning of this term,[7] but a Magistrate holding a preliminary inquiry under

[1] *Bain v. Whitehaven and Furness Junction Railway Company*, (1850) 3 H. L. C. 1.

[2] *Queen-Empress v. Tulja*, (1887) 12 Bom 36, 42

[3] *Ibid.*

[4] *The Collector of Benares v. Sheo Prasad*, (1883) 5 All. 487.

[5] *Queen-Empress v Bharma*, (1886) 11 Bom 702, F B.

[6] *Ezra v. The Secretary of State*, (1902) 30 Cal. 36.

[7] *Atchayya v. Gangayya*, (1892) 15 Mad 188, F. B

s 164 of the Criminal Procedure Code is not.[1] This Act is applicable to all proceedings before Indian Marine Courts (Act XIV of 1887, s. 68)

3. 'Affidavits.'—A declaration in the shape of an affidavit cannot be received as evidence of the facts stated in it.[2] Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. Matters to which affidavits shall be confined are regulated by O. XIX, rr. 1, 2 and 3 of the Civil Procedure Code, and by s. 539, Criminal Procedure Code.

4. 'Arbitrator.'—The provisions of the Evidence Act do not apply to proceedings before an arbitrator. Arbitrators are bound to conform to the rules of natural justice. They are unfettered by technical rules of evidence.[3]

Repeal of enactments

2. On and from that date the following laws shall be repealed :—

(1) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India ;

(2) all such rules, laws and regulations as have acquired the force of law under the twenty-fifth section of the Indian Councils Act, 1861, in so far as they relate to any matter herein provided for ; and

(3) the enactments mentioned in the schedule hereto to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

COMMENT.

The Act is intended to be a complete code of the law of evidence.

Clause (1) has the effect of repealing the whole of the [illegible] e so far as it was [illegible] and Mohammedan [illegible] not contained in any Statute or Regulation, and prohibits the use of any kind of evidence not specially authorised by the Act itself. This is the opposite of the rule adopted in continental countries, such as

1 *Queen-Empress* v *Bharma*, (1886) 11 Bom. 702, F B.

2 *In re Iswar Chunder Guho*, (1887) 14 Cal 653

3 *Suppu* v *Govindacharyar*, (1887) 11 Mad 85, 87.

France, where every thing is admissible as evidence which the law does not expressly exclude [1]

Clause (2) refers to various regulations issued by Government in Non-Regulation Provinces.

But the Evidence Act does not contain the whole law of evidence applicable to British India. The law of evidence is contained in the Evidence Act and in other Acts and Statutes which make specific provisions on matters of evidence and which are applicable to British India. Where, therefore, the records of a German Court were not authenticated in accordance with the Indian Evidence Act, but in the manner prescribed by the English Extradition Act, which is applicable in this country, the records were held admissible under it.[2]

The proviso to the section saves all rules of evidence which are to be found in different Acts and Regulations. There are several provisions of Statutes passed by the Parliament which are in force in India, and of Acts of the Indian Legislature dealing with matters of evidence Such provisions are excepted by this proviso.[3]

Interpretation clause

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context.—

"Court"

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

COMMENT.

This definition is not meant to be exhaustive. The word 'Court' means not only the judge in a trial by a judge with a jury, but includes both judge and jury.[4] A Magistrate holding a preliminary inquiry under s. 164 of the Code of Criminal Procedure in a police investigation does not exercise the functions of a Court.[5] Commissioners appointed to take evidence under the Civil or Criminal Procedure Codes must act in conformity with the provisions of this Act.

"Fact."

"Fact" means and includes—

(1) any thing, state of things, or relation of things capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

[1] *Queen-Empress* v. *Abdullah*, (1885) 7 All. 385, F B

[2] *In re Rudolph Stallmann*, (1911) 39 Cal 164

[3] *King-Emperor* v. *Tun Hlaing*, (1923) 1 Rang 759, F B

[4] *Empress* v *Ashootosh Chuckerbutty*, (1878) 4 Cal 483, F B

[5] *Queen-Empress* v. *Bharma*, (1886) 11 Bom 702, F B

Illustrations

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b*) That a man heard or saw something, is a fact

(*c*) That a man said certain words, is a fact.

(*d*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact

(*e*) That a man has a certain reputation, is a fact.

COMMENT

Clause (1) refers to external facts which can be perceived by the five senses. Clause (2) refers to internal facts which are the subject of consciousness. Thus facts are either physical or psychological.

Illustrations (*a*), (*b*) and (*c*) exemplify clause (1); and (*d*) and (*e*), clause (2).

A misrepresentation as to the intention of a person is a misrepresentation of a 'fact.'[1] See ill. (*d*) The state of a man's mind is as much a fact as the state of his digestion.[2]

"Relevant" One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

COMMENT.

The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, that one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.

'Relevant,' strictly speaking, means admissible in evidence Erroneous admission of any evidence does not make it relevant.

The word 'relevant' is used in the Act with two distinct meanings (*a*) as admissible, (*b*) as connected [3]

Of all rules of evidence, the most universal and the most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application The tribunal is created to determine matters which either are in dispute between contending

[1] *Re Jaladu*, (1911) 36 Mad 453, *The Crown* v. *Mussammat Soma*, (1916) P R No 17 of 1916 (Cr), *Saleh* v *Mussammat Bakhtauar*, (1916) P R No 3 of 1917

[2] Per Bowen, L J, in *Edgington* v *Fitzmaurice*, (1885) 29 Ch D 459, 483

[3] *Lala Chand* v *Sayed Shah*, (1899) 3 C W N cclxxiii

France, where every thing is admissible as evidence which the law does not expressly exclude.[1]

Clause (2) refers to various regulations issued by Government in Non-Regulation Provinces.

But the Evidence Act does not contain the whole law of evidence applicable to British India. The law of evidence is contained in the Evidence Act and in other Acts and Statutes which make specific provisions on matters of evidence and which are applicable to British India. Where, therefore, the records of a German Court were not authenticated in accordance with the Indian Evidence Act, but in the manner prescribed by the English Extradition Act, which is applicable in this country, the records were held admissible under it.[2]

The proviso to the section saves all rules of evidence which are to be found in different Acts and Regulations. There are several provisions of Statutes passed by the Parliament which are in force in India, and of Acts of the Indian Legislature dealing with matters of evidence. Such provisions are excepted by this proviso.[3]

Interpretation clause

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court"

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

COMMENT.

This definition is not meant to be exhaustive. The word 'Court' means not only the judge in a trial by a judge with a jury, but includes both judge and jury.[4] A Magistrate holding a preliminary inquiry under s 164 of the Code of Criminal Procedure in a police investigation does not exercise the functions of a Court.[5] Commissioners appointed to take evidence under the Civil or Criminal Procedure Codes must act in conformity with the provisions of this Act.

"Fact."

"Fact" means and includes—

(1) any thing, state of things, or relation of things capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

1 *Queen-Empress* v *Abdullah*, (1885) 7 All. 385, F. B

2 *In re Rudolph Stallmann*, (1911) 39 Cal 164.

3 *King-Emperor* v. *Tun Hlaing*, (1923) 1 Rang. 759, F B

4 *Empress* v. *Ashootosh Chuckerbutty*, (1878) 4 Cal 483, F B

5 *Queen-Empress* v. *Bharma*, (1886) 11 Bom 702, F B

Illustrations

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b*) That a man heard or saw something, is a fact

(*c*) That a man said certain words, is a fact

(*d*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact

(*e*) That a man has a certain reputation, is a fact

COMMENT.

Clause (1) refers to external facts which can be perceived by the five senses. Clause (2) refers to internal facts which are the subject of consciousness. Thus facts are either physical or psychological

Illustrations (*a*), (*b*) and (*c*) exemplify clause (1); and (*d*) and (*e*), clause (2)

A misrepresentation as to the intention of a person is a misrepresentation of a 'fact.'[1] See ill. (*d*). The state of a man's mind is as much a fact as the state of his digestion [2]

"Relevant"

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

COMMENT.

The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, that one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other.

'Relevant,' strictly speaking, means admissible in evidence Erroneous admission of any evidence does not make it relevant.

The word 'relevant' is used in the Act with two distinct meanings (*a*) as admissible, (*b*) as connected [3]

Of all rules of evidence, the most universal and the most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application The tribunal is created to determine matters which either are in dispute between contending

1 *Re Jaladu*, (1911) 36 Mad 453, *The Crown* v. *Mussammat Soma*, (1916) P R No 17 of 1916 (Cr), *Saleh* v *Mussammat Bakhtawar*, (1916) P R No 3 of 1917

2 Per Bowen, L J., in *Edgington* v *Fitzmaurice*, (1885) 29 Ch D 459, 483

3 *Lala Chand* v *Sayed Shah*, (1896) 3 C. W. N. cclxviii

parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. Evidence may be rejected as irrelevant for one or two reasons: 1st, That the connection between the principal and evidentiary facts is too remote and conjectural. 2nd, That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered.[1]

"Facts in issue"

The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations.

A is accused of the murder of B

At his trial the following facts may be in issue:—

that A caused B's death,

that A intended to cause B's death;

that A had received grave and sudden provocation from B,

that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature

COMMENT.

Facts in issue mean the matters which are in dispute or which form the subject of decision in the suit. In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember that the question is whether the evidence offered is relevant *to any of them*; because evidence not admissible in one point of view, or for one purpose, may be perfectly admissible in some other point of view, or for some other purpose. (1) Evidence not admissible to prove some of the issues or matters in question may be admissible to prove others; evidence not admissible in *causa*, may be most valuable as evidence *extra causam*; and evidence not receivable either in proof of the

[1] Best, 12th Edn., ss. 251, 252, p. 232.

facts in dispute, or to test the credit of witnesses, etc., may be important as showing the amount of damage sustained by a plaintiff, etc. (2) Evidence not admissible in the first instance may become so by matter subsequent. . . (3) Evidence may be admissible to prove a subalternate principal fact, which might not be admissible to prove the immediate fact in issue. . In all cases . . the ultimate presumption must be connected either mediately or immediately with facts established by proof.[1]

The 'facts in issue' are facts out of which some legal right, liability, or disability, involved in the enquiry, necessarily arises, and upon which, accordingly, a decision must be arrived at. Matters which are affirmed by one party to a suit and denied by the other may be denominated, facts in issue; what facts are in issue in particular cases, is a question to be determined by the substantive law or in some cases by that branch of the law of procedure which regulates the law of pleadings, civil or criminal.

Criminal cases.—As regards criminal cases, the charge constitutes and includes the facts in issue See Chapter XIX of the Criminal Procedure Code.

Civil cases.—As regards civil cases, facts in issue are determined by the process of framing issues. See O. XIV, rr. 1-7, Civil Procedure Code.

"Document"

"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document

Words printed, lithographed or photographed are documents:

A map or plan is a document

An inscription on a metal plate or stone is a document

A caricature is a document

COMMENT.

Under the term 'documents' are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol Thus the wooden scores on which bakers, milkmen, etc., indicate, by notches, the number of loaves of bread or quarts of milk supplied to their customers . . [illegible]
In some instanc[illegible]
mentary and re[illegible]
drawings, which clearly belong to the latter head, but differ from

[1] Best, 12th Edn., s. 264, pp. 243, 244

parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. Evidence may be rejected as irrelevant for one or two reasons: 1st, That the connection between the principal and evidentiary facts is too remote and conjectural. 2nd, That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered.[1]

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[1] Best, 12th Edn., ss. 251, 252, p. 232.

The Evidence Act contains no reference to a distinction between direct proof and indirect proof or proof by circumstantial evidence.

The definition of 'evidence' covers (*a*) the evidence of witnesses and (*b*) documentary evidence It does not cover everything that the Court has before it. There are certain other *media* of proof, *e g*, the statements of parties and accused persons, the demeanour of witnesses, the result of local investigations, facts of which the Court takes judicial notice and any real or personal property, the inspection of which may be material in determining the questions at issue, such as weapons, tools or stolen property [1] The definition of 'evidence' is considered to be incomplete as it does not include the whole material on which the decision of the Judge may rest

Confessions of co-accused, whether evidence—The confessions of persons, jointly tried for the same offence with an accused person, are not, according to the Bombay High Court, technically evidence [2] But the Calcutta High Court has held in a Full Bench case that, though the evidentiary value of such confessions may be but little, they are 'evidence.'[3] Statements made by an accused person are not evidence within the definition given in this section.[4]

Evidence taken in a different case.—The evidence given in one case upon the issues raised in that case cannot be taken into consideration in another case in which other issues arise, but parties may agree that evidence taken in one suit shall be treated as evidence in another [5]

Evidence of Judge—If, in a case, a Judge wishes to give evidence, and intends the Courts to act on his statement of facts, he should make that statement in the same manner as any other witness, and not merely introduce it in his judgment A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts [6]

"Proved

A fact is said to be proved when, after considering the matters before it,[1] the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

1 Field, 7th Edn, p 15
2 *Queen-Empress* v *Khandia bin Pandu*, (1890) 15 Bom 66
3 *Empress* v *Ashootosh Chuckerbutty*, (1872) 4 Cal 483 F B
4 *Nga Tha Nyan* v *Queen-Empress*, (1897) P J L B 308
5 *In re Lubeck*, (1905) 7 Bom. L. R. 894, P C
6 *Hurpurshad* v *Sheo Dyal*, (1876) 3 I A 259

that which we are now considering in this, that they are *actual*, not *symbolical* representations. Documents, being inanimate things, necessarily come to the cognizance of tribunals through human testimony; for which reason some old authors have denominated them *dead* proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be *living* proofs (*probatio viva*).[1]

"Evidence." "Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry:

such statements are called oral evidence,

(2) all documents produced for the inspection of the Court;

such documents are called documentary evidence.

COMMENT.

The word 'Evidence' considered in relation to Law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. This term and the word *proof* are often used as synonyms; but the latter is applied by accurate logicians, rather to the *effect* of evidence, than to evidence itself.[2] 'Evidence' has been defined to be any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact.

A law of evidence properly constructed would be nothing less than an application of practical experience acquired in Courts of law to the problem of enquiring into the truth as to controverted questions of fact.[3]

"Evidence is either *direct* or *indirect*; according as the principal fact follows from the evidentiary—the *factum probandum* from the *factum probans*—immediately or by inference. In jurisprudence, however, direct evidence is commonly used in the secondary sense, *viz.*, as limited to cases where the principal fact, or *factum probandum*, is attested directly by witnesses, things, or documents. Indirect evidence, known in forensic procedure by the name of "circumstantial evidence," is either conclusive or presumptive; *conclusive*, where the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is a necessary consequence of the laws of Nature: *presumptive*, where it only rests on a greater or less degree of probability."[4]

[1] Best, 12th Edn, ss 215, 216, pp. 199, 200

[2] Taylor, 11th Edn, s 1, p. 1.

[3] Speech of Mr. Stephen, Bom. Gov Gaz, Part V, p 27.

[4] Best, 12th Edn, s 27, p 16

due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; . . . 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.' The expression 'moral certainty' is here used in contradistinction to physical certainty, or certainty properly so called; for the physical possibility of the innocence of any accused person can never be excluded."[1] There is only one standard of proof applicable alike to civil and criminal trials This is apparent from the definition of 'proved' and 'disproved' in this section.[2]

"The rules regulating the *admissibility* of evidence are, in general, the same in civil as in criminal proceedings" When dealing with the serious question of the guilt or innocence of
eneral rules have been

ential to the establishment of the charge against the accused, lies on the prosecutor.

(2) The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.

(3) In matters of doubt it is not only safer to acquit than to condemn, since it is better that several guilty persons should escape than that one innocent person should suffer.

(4) There must be clear and unequivocal proof of the *corpus delicti*

(5) The hypothesis of delinquency should be consistent with all the facts proved."[3]

"Disproved"

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved"

A fact is said not to be proved when it is neither proved nor disproved.

1 Best, 12th Edn, s 95, p 82

2 *In re Moti Lal Ghose*, (1917) 45 Cal 169.

3 Best, 12th Edn., ss. 439-451, pp. 372-382.

COMMENT.

The word 'proof' seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like.

The rules of evidence cannot be departed from, because there may be a strong moral conviction of guilt; for a Judge cannot set himself above the law which he has to administer or make it or mould it to suit the exigencies of a particular occasion [1]

The degree of certainty which must be arrived at before a fact is said to be proved is that described in this section.[2]

1. 'Matters before it.'—The expression 'matters before it' includes matters which do not fall within the definition of 'evidence' in s. 3 Therefore, in determining what is evidence other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved.' It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the words, 'matters before it.' For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court, before whom the admission was made, would have to take into consideration in order to determine whether the particular fact was proved or not.[3] So the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though not 'evidence' within the definition given by the Act.

The result of a local enquiry by a presiding judicial officer, although it does not come under cls. (1) and (2) of the definition of the word 'evidence,' falls within the meaning of the word 'proved' which comes immediately after.[4]

Difference between evidence in civil and criminal proceedings.—The rules of evidence are in general the same in civil and criminal proceedings, and bind alike Crown and subject, prosecutor and accused, plaintiff and defendant. There are, however, some exceptions, *e.g.*, doctrine of estoppel applies to civil proceedings only. The provisions relating to confessions (ss. 24-30), character of persons appearing before Court (ss. 53-54), and incompetence of parties as witnesses (s. 120), are peculiar to criminal proceedings "But there is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability,

[1] Per Jenkins, C. J., in *Barindra Kumar Ghose* v. *Emperor*, (1909) 37 Cal 467.

[2] *Abdul Karim* v. *The Crown*, (1887) P R. No 32 of 1878 (Cr).

[3] Per Mitter, Offg. C. J., in *Joy Coomar* v. *Bundhoo Lall*, (1882) 9 Cal 363, 366.

[4] *Ibid.*

due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty, . . . 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.' The expression 'moral certainty' is here used in contradistinction to physical certainty, or certainty properly so called; for the physical possibility of the innocence of any accused person can never be excluded."[1] There is only one standard of proof applicable alike to civil and criminal trials. This is apparent from the definition of 'proved' and 'disproved' in this section[2]

"The rules regulating the *admissibility* of evidence are, in general, the same in civil as in criminal proceedings" When dealing with the serious question of the guilt or innocence of [illegible] rules have been

[illegible] to the establish-[illegible]he prosecutor.

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"Disproved"

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved"

A fact is said not to be proved when it is neither proved nor disproved.

[1] Best, 12th Edn, s 95, p 82.

[2] *In re Moti Lal Ghose*, (1917) 45 Cal 169.

[3] Best, 12th Edn, ss. 430-451, pp. 372-382.

COMMENT.

This definition of 'proved' is the embodiment of a sound rule of common-sense It describes what degree of certainty must be arrived at before a fact can be said to be proved. Proof means anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition. There is no law in this country which recognizes different degrees of proof in different cases.[1] But a much stricter degree of proof is required in penal proceedings than in civil ones, and the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt. Thus, in a civil case, a Judge of fact must find for the party in whose favour there is a preponderance of proof, though the evidence is not entirely free from doubt. In a criminal case no weight of preponderant evidence is sufficient short of that which excludes all reasonable doubt. Unbiassed moral conviction is no sufficient foundation for a verdict of guilty unless it is based on substantial facts leading to no other reasonable conclusion than that of guilt. In cases dependent on circumstantial evidence, the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hypothesis than that of his guilt. Circumstantial evidence, not furnishing conclusive evidence against an accused, though forming a ground for grave suspicion against him, cannot sustain a conviction. To justify the inference of guilt from circumstances, the inculpating facts must be shown to be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis than that of guilt[2] No man can be convicted of an offence where the theory of his guilt is no more likely than the theory of his innocence.[3]

"May presume"

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

"Shall presume"

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

"Conclusive proof."

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other

1 See *Weston* v. *Peary Mohan Dass*, (1912) 40 Cal 898

2 *Emperor* v. *Kangal Mali*, (1905) 41 Cal 601

3 *Emperor* v. *Shidas Omkar*, (1912) 15 Bom. L. R. 315

as proved, and shall not allow evidence to be given for the purpose of disproving it.

COMMENT.

"The term 'presumption' in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted."[1]

Inferences or presumptions are always necessarily drawn wherever the testimony is circumstantial: but presumptions, specially so called, are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum* which warrants a presumption from the one to the other, wherever the two are brought into contiguity. Presumptions are drawn from the course of Nature, for instance, that night will follow day, the seasons follow each other, deaths ensue from a mortal wound, and the like, or from the course of human affairs, from a familiarity with the ordinary springs of human action, from the usages of society, domestic relationship and transactions in business (see s 114).[2]

A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from a particular evidence, unless and until the truth of such inference is disproved.

Presumptions are divided into—

(1) Presumptions of fact This is akin to "may presume" of this section See ss. 86-88 and 90

(2) Presumptions of law These are :—

(*a*) Absolute—akin to "conclusive proof" of this section. See ss. 41, 112 and 113.

(*b*) Disputable or rebuttable—akin to "shall presume" of this section. See ss. 79-85, 89, 105, 107-111

A Court, where it 'may presume' a fact, has a discretion to presume it as proved, or to call for confirmatory evidence of it, as the circumstances require. In such a case the presumption is not a hard and fast presumption, incapable of rebuttal, a presumption *juris et de jure*.[3] In cases in which a Court shall presume a fact, the presumption is not conclusive but rebuttable.

Presumption of fact or natural presumptions are inferences which are naturally and logically drawn from experience and observation of the course of nature, the constitution of human mind, the springs of human action, the usages and habits of society These presumptions are generally rebuttable. Clause (1) of the section appears to point at presumptions of facts.

1 Best, 12th Edn., s 299, p 267.
2 Norton, 97.
3 *Emperor* v *Shrinivas*, (1905) 7 Bom L R 969

Presumptions of law or, as they are also called, "intendments" of law, and by the civilians, "*præsumptiones seu positiones juris*," are inferences or positions established by law, common or statute, and have been shown to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects: 1st, that in the latter a discretion, more or less extensive as to drawing the inference is vested in the tribunal; while in those now under consideration, the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. 2nd, as presumptions of law are, in reality, rules of law, and part of the law itself, the Court may draw the inference whenever the requisite facts are before it.[1] Presumptions of law are based, like presumptions of fact, on the uniformity of deduction which experience proves to be justifiable; they differ in being vested by the law with the quality of a rule, which directs that they *must* be drawn; they are permissive like natural presumptions, which may or *may* not be drawn; and presumptions of law again differ in their force, according as they are rebuttable or irrebuttable. As to the former, the presumption shall stand good only until it is disproved. The latter class, or irrebuttable presumptions, the law holds conclusive.[2] See ss. 79 to 90 and s. 105 *supra* as to presumptions of fact and rebuttable presumptions of law.

Conclusive presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong..... *Fictions of law* are closely allied to irrebuttable presumptions of law... In other words, where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible..... On the whole, modern courts of justice are slow to recognise presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To preclude a party, by an arbitrary rule, from adducing evidence which, if received, would compel a de[illegible] his [illegible] is an act which can only be justified by the [illegible] expe[illegible] and soundest policy; and some presumption[illegible] class never to have found their way into it.[3]

Clause 3 of the section points at irreb[illegible] of law and the number of such presumpti[illegible] ss. 41, 112, 113 *supra* and s. 82 of the Indi[illegible]

Mixed presumptions of [illegible] **and fact** [illegible] to the English law of R[illegible] Th[illegible] of importance in this country.

1 Best, 12th Edn., s. 304, p. [illegible] Best, 12th
2 Norton, 97. [illegible], 274-275

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death

At A's trial the following facts are in issue :—

A's beating B with the club ,

A's causing B's death by such beating ,

A's intention to cause B's death

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case a bond on which he relies This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

COMMENT.

Section 3 says that one fact is relevant to another when the one is connected with the other in any of the ways referred to in this chapter. Relevancy is thus fully explained in ss 6-11. "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings They are designedly worded very widely, and in such a way as to overlap each other Thus a motive for a fact in issue (s 8) is part of its cause (s. 7), subsequent conduct. influenced by it (s 8) is part of its effect (s 7) Facts relevant under s 11 would, in most cases, be relevant under other sections."[1]

The object of this section is to restrict the investigation made by Courts within the bounds prescribed by general convenience.

Of no fact can evidence be given unless it be either a fact in issue or one declared relevant under the following sections. Thus evidence of all collateral facts, which are incapable of affording

[1] Stephen's Introduction, 72

Presumptions of law or, as they are also called, "intendments" of law, and by the civilians, "*præsumptiones sen positiones juris*," are inferences or positions established by law, common or statute, and have been shown to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects: 1st, that in the latter a discretion, more or less extensive as to drawing the inference is vested in the tribunal; while in those now under consideration, the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. 2nd, as presumptions of law are, in reality, rules of law, and part of the law itself, the Court may draw the inference whenever the requisite facts are before it.[1] Presumptions of law are based, like presumptions of fact, on the uniformity of deduction which experience proves to be justifiable; they differ in being vested by the law with the quality of a rule, which directs that they *must* be drawn; they are permissive like natural presumptions, which may or *may* not be drawn; and presumptions of law again differ in their force, according as they are rebuttable or irrebuttable. As to the former, the presumption shall stand good only until it is disproved. The latter class, or irrebuttable presumptions, the law holds conclusive.[2] See ss. 79 to 90 and s. 105 *supra* as to presumptions of fact and rebuttable presumptions of law.

Conclusive presumptions are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong..... *Fictions of law* are closely allied to irrebuttable presumptions of law... In other words, where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible..... On the whole, modern courts of justice are slow to recognise presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To preclude a party, by an arbitrary rule, from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it.[3]

Clause 3 of the section points at irrebuttable presumptions of law and the number of such presumptions is very few (see ss. 41, 112, 113 *supra* and s. 82 of the Indian Penal Code).

Mixed presumptions of law and fact are chiefly confined to the English law of Real Property. These are not of any importance in this country.

1 Best, 12th Edn., s. 304, p. 272
2 Norton, 97.
3 Best, 12th Edn., ss. 306, 307, 309, pp. 272, 274-275.

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a*) A is tried for the murder of B by beating him with a club with the intention of causing his death

At A's trial the following facts are in issue —

A's beating B with the club,

A's causing B's death by such beating,

A's intention to cause B's death

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

COMMENT

Section 3 says that one fact is relevant to another when the one is connected with the other in any of the ways referred to in this chapter. Relevancy is thus fully explained in ss. 6-11. "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings They are designedly worded very widely, and in such a way as to overlap each other Thus a motive *for a fact in issue (s. 8) is part of its cause (s 7), subsequent conduct.* influenced by it (s. 8) is part of its effect (s. 7) Facts relevant under s 11 would, in most cases, be relevant under other sections "[1]

The object of this section is to restrict the investigation made by Courts within the bounds prescribed by general convenience.

Of no fact can evidence be given unless it be either a fact in issue or one declared relevant under the following sections. Thus evidence of all collateral facts, which are incapable of affording

1 Stephen's Introduction, 72

any reasonable presumption as to the principal matters in dispute, are excluded to save public t[illegible] not covered by the purview [illegible] last four words of the sectio[illegible] from proving any facts not in issue or not declared relevant by any of the remaining sections of this chapter. To establish the relevancy of any fact, it must be shown that it is a fact in issue or a fact such as hereinafter declared to be relevant. Evidence is to be confined strictly to the issue. The object of this chapter is to point out in what cases collateral facts are relevant.

Admissibility of a document.—A party filing a document cannot urge its inadmissibility when the opposite party seeks to use it against him.[1]

Where no objection is taken in the Court of first instance to the reception of a document in evidence, it is not within the province of the appellate Court to raise or recognise it in appeal.[2]

Explanation.—This explanation prohibits a party from claiming any relief upon facts or documents not stated or referred to by him in his pleadings. Illustration (*b*) elucidates the meaning of the explanation.

Relevancy of facts forming part of same transaction

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(*a*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c*) A sues B for a libel contained in a letter forming part of a correspondence Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself

(*d*) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

[1] *Raman v Secretary of State for India in Council*, (1900) 24 Mad 427.

[2] *Chimnaji Govind Godbole v. Dinkar Dhondev Godbole*, (1886) 11 Bom. 320; *Akbur Ali v. Bhyea Lal Jha*, (1880) 6 Cal 666.

COMMENT.

This section admits those facts the admissibility of which comes under the technical expression *res gestæ* (*i e.*, the original proof of what has taken place), but such facts must 'form part of the same transaction.' If facts form part of the transaction which is the subject of enquiry, manifestly, evidence of them ought not to be excluded The question is whether they do form part or are too remote to be considered really part of the transaction before the Court A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue. Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay [1] Illustration (*b*) indicates that acts done at different places and times may form part of the same transaction

A transaction in its ordinary sense is some business or dealing which is carried on or transacted between two or more persons [2] The best explanation of the principle which admits evidence of *res gestæ* is this. "The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others, and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature."[3]

This and the following sections deal with circumstantial evidence. Sections 7, 8 and 9 explain and illustrate this section.

CASES.

Facts forming part of the same transaction.—Statements of bystanders witnessing a transaction are relevant if they are made while the transaction is in progress or so shortly before or after it as to form part of the same transaction [4] A person cannot be convicted of one felony by proving him guilty of another unconnected felony, yet, where several felonies are connected together and form part of one transaction, the one is evidence to show the character of the other.[5] The felling of trees, lasting over a month, with the theft of which the prisoner was charged, was held to form one transaction [6] Where A was tried for the murder of B by shooting him,

[1] *Chain Mahto* v *The Emperor*, (1906) 11 C W N 266, 270

[2] *Gujju Lall* v *Fatteh Lall*, (1880) 6 Cal 171, F B

[3] Taylor, 11th Edn, s 583, p 401

[4] *Chain Mahto* v. *The Emperor*, (1906) 11 C W N 266.

[5] *The King* v *Ellis*, (1826) 6 B & C 145

[6] *The Queen* v *Shepherd*, (1868) L. R 1 C.C. R 118.

the facts that the person, then in the room with B, saw a man with a gun in his hand pass a window opening into the room where B was shot, and thereupon exclaimed "there's butcher" (a name by which A was known), were held to be relevant.[1]

The only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person, immediately after the commission of the offence. It was held that the evidence was admissible under ss. 6 and 8, illustration (*g*).[2]

Facts not so connected as to form part of the same transaction.—Where a person was charged with forging a particular document, evidence that a number of documents apparently forged, or held in readiness for the purpose of forgery, were found in the prisoner's possession, was held inadmissible.[3] The accused was charged with having received illegal gratifications from C. & Co. on three occasions in 1876. In 1876, 1877 and 1878, C. & Co. were doing business as commissariat contractors and the accused was the manager of the commissariat office. It was held that the evidence of similar but unconnected instances of receiving illegal gratifications from C. & Co. in 1877 and 1878 was not admissible against him under ss. 5 to 13.[4] In the trial of certain persons for murder several witnesses were produced who testified to the fact that one S had told them the morning following the night on which the murder was committed that he had seen the accused commit the murder. S himself was also produced but denied all knowledge of the occurrence. The lower Court also admitted the evidence of one Mussamat J., the wife of one of the accused, disclosing com-

[illegible]

as the words were not said *during* the transaction, but *subsequent* to its completion.[5] Similarly, evidence of witnesses who deposed that the deceased had made certain statements to them eight or nine months and even ten days prior to his murder were held inadmissible under this section or s. 8.[6]

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Facts which are the occasion, cause or effect of facts in issue

[1] *Fowkes*, Stephen's Digest

[2] *In re Surat Dhobni*, (1884) 10 Cal. 302.

[3] *Hari Chintaman Dikshit* v. *Moro Lakshman*, (1886) 11 Bom. 89.

[4] *The Empress* v. *M. J. Vyapoory Moodeliar*, [illegible]

[illegible] 4 Lah. 451.

Illustrations

(a) The question is, whether A robbed B

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant

(b) The question is, whether A murdered B

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts

COMMENT.

This section admits a very large class of facts connected with facts in issue or relevant facts in addition to those admitted by the preceding section Evidence relating to collateral facts is admissible when such facts will, if established, establish reasonable presumption as to the matter in dispute and when such evidence is reasonably conclusive. But a fact in issue cannot be proved by showing that facts similar to it, but not part of the same transaction, have occurred at other times. Thus when the question is, whether a person has committed a crime, the fact that he had committed before a similar crime was irrelevant.

Motive, preparation and previous or subsequent conduct

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party,[1] or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto

Explanation 1.[2]—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.[3]—When the conduct of any person is relevant, any statement made to him or in his

presence and hearing, which affects such conduct, is relevant.

Illustrations

(*a*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b*) A sues B upon a bond for the payment of money. B denies the making of the bond

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant

(*c*) A is tried for the murder of B by poison

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d*) The question is whether a certain document is the will of A.

The facts, that not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve, are relevant.

(*e*) A is accused of a crime

The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f*) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.

(*g*) The question is whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—" I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts

(*h*) The question is, whether A committed a crime

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i*) A is accused of a crime.

The facts that, *after the commission of the alleged* crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157

(k) The question is, whether A was robbed

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157

COMMENT.

Under this section the motive which induces a party to do an act, or the preparation which he makes in its commission, will be taken into account. Evidence of motive or preparation becomes important when a case depends upon circumstantial evidence only.

The Evidence Act intends to make only those statements admissible which are the essential complement of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial.[1]

Motive.—There can be no action without a motive, which must exist for every voluntary act Generally speaking the voluntary acts of sane persons have an impelling emotion or motive Motive in the correct sense is the emotion supposed to have led to the act. If there is motive in doing an act, then the adequacy of that motive is not in all cases necessary. Heinous offences have been committed from very slight motive. Evidence of motive is material in criminal cases. Illustrations (a) and (b) refer to motive. The motives of parties can only be ascertained by inference drawn from facts Where A was tried for the murder of B, the fact that, at the instigation of A, B murdered C long before B's murder, and that A, at about that time, used expressions of malice against C, were held to be relevant as furnishing motive, on the part of A, who murdered B[2]

Preparation.—Preparation and previous attempts to commit an offence are instances of previous conduct of the party influencing the fact in issue or relevant fact Where the question was whether

1 Per West, J, in *Empress* v *Rama Birapa*, (1878) 3 Bom 12, 17

2 *Rex* v *Clewes*, (1830) 4 C. & P. 221.

A committed an offence, the fact of his having procured the instruments, which were used in its commission, was held to be relevant.[1] Illustrations (*c*) and (*d*) refer to preparation.

1. 'Conduct of any party.'—The conduct of any party or his agent in reference to a suit or proceeding will be scanned under this section.

In the case of documents the Courts very often interpret them by evidence of the mode in which property dealt with by them has been held and enjoyed. Sugden, L.C., in a case said: "Tell me what you have done under such a deed, and I will tell you what that deed means."[2]

The word 'party' includes the plaintiff and defendant in a civil suit as well as the accused in a criminal prosecution.

2. Explanation 1.—The conduct of a party interested in any proceeding at the time when the facts occurred out of which the proceeding arises is extremely relevant. According to this explanation the word 'conduct' does not include statements unless those statements accompany and explain acts other than statements; and it is on such a statement that the significance of the act, which it [illegible] wholly depends. Mere statements, as [illegible] stitute conduct. This explanation [illegible] whose conduct is in dispute, mixes up together actions and statements; and in such case those actions and statements may be proved as a whole For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted Here, what the person says and what he does may be taken together and proved as a whole.[3]

[illegible] ies of statements of [illegible] Statements made [illegible] are not admissible in evidence as conduct or otherwise.[5]

This section, so far as it admits a statement as included in the word 'conduct,' must be read in connection with ss 25 and 26, [illegible] would be shut out [illegible] under this section [illegible] nfluenced by a fact [illegible]

1 *Palmer*, Stephen's Digest, 10.

2 *Attorney-General* v. *Drummond*, (1849) 2 H. L. C. 837.

3 Per Petheram, C. J., in *Queen-Empress* v. *Abdullah*, (1885) 7 All. 385. 395. F. B.

4 *Subramanyan* v. *Paramaswarar*, (1887) 11 Mad. 116, F. B

5 *Queen-Empress* v *Nana*, (1889) 14 Bom 260, F. B

6 *Ibid.*

as taken alone, and without referring to questions leading to them, there was nothing to connect them with the cause of death and so to make them relevant.[1]

Acts of parties cannot be allowed to affect the construction of written instrument if that construction be in itself ambiguous[2]; otherwise, the conduct of the party is very important in the construction of documents In criminal cases all the circumstances of the case in every part of the conduct of the accused may be taken into consideration for the purpose of showing the presence of crime by negativing the operation of every natural agency

Illustration *(d)* refers to previous conduct ; ill. *(e)*, to previous and subsequent conduct of the accused.

3. **Explanation 2.**—Statements made in the presence of a

of an admission, and therefore evidence against himself. It is a general rule that statements made in the presence of the prisoner, and

him

must

incri

opportunity to speak. Silence is not evidence of an admission, un-

be shown that the conduct which they allege to affect is relevant.[5]

CASES.

The accused conspired together, murdered a person, and implicated their enemies into the offence. The persons so implicated absconded, but the truth came to light and the accused were tried for murder. At the trial evidence was led to show that in two previous trials for murders enemies of the accused were falsely involved into the offence when some of the accused had in reality committed the offence. It was held that such evidence was not admissible inasmuch as though the fact of enmity might be proved yet the real truth about the previous murders could not be said to constitute a motive or preparation for any fact in issue in the present proceedings.[6]

In a trial for kidnapping, robbery and murder, the subsequent conduct of the accused, in making evidence for himself to prove

[1] *Queen-Empress* v. *Abdullah*, (1885) 7 All 385, F B

[2] *In re Purmanandas Jeewandas*, (1882) 7 Bom. 109.

[3] *Reg* v. *Mallory*, (1884) 15 Cox 456.

[4] Per Bowen, L J, in *Wiedemann* v *Walpole*, [1891] 2 Q. B. 534.

A committed an offence, the fact of his having procured the instruments, which were used in its commission, was held to be relevant.[1] Illustrations (*c*) and (*d*) refer to preparation.

1. 'Conduct of any party.'—The conduct of any party or his agent in reference to a suit or proceeding will be scanned under this section.

In the case of documents the Courts very often interpret them by evidence of the mode in which property dealt with by them has been held and enjoyed. Sugden, L.C., in a case said: "Tell me what you have done under such a deed, and I will tell you what that deed means."[2]

The word 'party' includes the plaintiff and defendant in a civil suit as well as the accused in a criminal prosecution.

2. Explanation 1.—The conduct of a party interested in any [illegible] s *occurred out of which the* [illegible] According to this explana- [illegible] ude statements unless those [illegible]

distinguished from acts, do not constitute conduct. This explanation points to a case in which a person, whose conduct is in dispute, mixes up together actions and statements; and in such case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here, what the person says and what he does may be taken together and proved as a whole.[3]

[illegible] of statements of [illegible] Statements made [illegible] e not admissible in evidence as conduct or otherwise.[5]

This section, so far as it admits a statement as included in the word 'conduct,' must be read in connection with ss. 25 and 26, and cannot admit a statement as evidence which would be shut out by those sections.[6] The conduct made relevant under this section is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as, questions or suggestions by other persons. Thus signs made by the deceased, shortly before her death, when questioned as to the circumstances under which injuries had been inflicted on her, could not be proved as conduct, inasmuch

[1] *Palmer*, Stephen's Digest, 10.

[2] *Attorney-General* v. *Drummond*, (1849) 2 H. L. C. 837.

[3] Per Petheram, C. J., in *Queen-Empress* v. *Abdullah*, (1885) 7 All. 385, 395. F. B.

[4] *Subramanyan* v. *Paramaswarar*, (1887) 11 Mad 116, F. B

[5] *Queen-Empress* v *Nana*, (1886) 14 Bom. 260, F. B

[6] *Ibid*

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d*) A sues B for inducing C to break a contract of service made by him with A C, on leaving A's service, says to A— "I am leaving you because B has made me a better offer" This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue

(*e*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—"A says you are to hide this" B's statement is relevant as explanatory of a fact which is part of the transaction

(*f*) A is tried for a riot and is proved to have marched at the head of a mob The cries of the mob are relevant as explanatory of the nature of the transaction

COMMENT.

Section 7 dealt with the admissibility of facts which are the occasion, cause, or effect of facts in issue Section 8 similarly made admissible facts showing motive or preparation for any fact in issue or relevant fact The present section makes admissible facts which are necessary to explain or introduce relevant facts, such as place, name, date, identity of parties, circumstances and relations of the parties Thus evidence of other offences committed by the accused is admitted in order to establish his identity or to corroborate the testimony of a witness in a material particular Section 11 is like the present section

Illustrations (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) illustrate the meaning of the expression—'Facts necessary to explain and introduce a fact in issue or relevant fact'

Illustrations (*d*) and (*e*) indicate that explanatory statements are admitted under this section irrespective of the fact whether the person against whom it is made heard it or was present when it was made. Under this section it is not necessary that the person against whom the statement is made should be present when it is made. The English law requires the presence of the person against whom the statement is made This section has introduced a dangerous innovation.

Identity.—The question of identity under this section does not arise till the offender committing the crime charged is ascertained by independent evidence [1]

CASES.

Judgment in a previous suit explaining the relationship of parties.—One of the questions in issue in a suit as to the pedigree of a certain family being whether one G was son of B or of one M, belonging to a totally different family from that of B, an attested copy of a judgment in some proceedings long anterior to the suit was tendered in evidence, in which judgment G was

[1] *Emperor* v. *Panchu Das*, (1920) 47 Cal. 671, F. B

alibi, his projected flight by sea, and his endeavour to conceal his identity, were admitted in evidence as conduct indicating a consciousness of impending danger and guilt.[1] Evidence of the possession by the accused of a large number of coins not in common circulation and his attempt to dispose of them were held to be admissible, on his trial for having fraudulently delivered to another counterfeit coins knowing them to be counterfeit [2] In a trial for the offence of cheating, the facts that the accused was financially embarrassed and had attempted to cheat on other occasions are relevant to prove motive under this section [3]

Illustrations (j) and (k).—Under these illustrations the terms of the complaint are admissible as original evidence.[4]

Facts necessary to explain or introduce relevant facts

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which established the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a*) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b*) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B

(*c*) A is accused of a crime

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

[1] *Queen-Empress v Sami*, (1890) 13 Mad 426

[2] *Queen Empress v. Nur Mahomed*, (1883) 8 Bom 223

[3] *A. V. Joseph v. King Emperor*, (1924) 3 Rang 11.

[4] *Queen v. Macdonald*, (1872) 10 B L R. App 2

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d*) A sues B for inducing C to break a contract of service made by him with A C, on leaving A's service, says to A— "I am leaving you because B has made me a better offer" This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue

(*e*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—" A says you are to hide this" B's statement is relevant as explanatory of a fact which is part of the transaction

(*f*) A is tried for a riot and is proved to have marched at the head of a mob The cries of the mob are relevant as explanatory of the nature of the transaction

COMMENT.

Section 7 dealt with the admissibility of facts which are the occasion, cause, or effect of facts in issue. Section 8 similarly made admissible facts showing motive or preparation for any fact in issue or relevant fact The present section makes admissible facts which are necessary to explain or introduce relevant facts, such as place, name, date, identity of parties, circumstances and relations of the parties Thus evidence of other offences committed by the accused is admitted in order to establish his identity or to corroborate the testimony of a witness in a material particular Section 11 is like the present section

Illustrations (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) illustrate the meaning of the expression—'Facts necessary to explain and introduce a fact in issue or relevant fact'

Illustrations (*d*) and (*e*) indicate that explanatory statements are admitted under this section irrespective of the fact whether the person against whom it is made heard it or was present when it was made Under this section it is not necessary that the person against whom the statement is made should be present when it is made. The English law requires the presence of the person against whom the statement is made. This section has introduced a dangerous innovation.

Identity.—The question of identity under this section does not arise till the offender committing the crime charged is ascertained by independent evidence.[1]

CASES.

Judgment in a previous suit explaining the relationship of parties.—One of the questions in issue in a suit as to the pedigree of a certain family being whether one G was son of B or of one M, belonging to a totally different family from that of B, an attested copy of a judgment in some proceedings long anterior to the suit was tendered in evidence, in which judgment G was

[1] *Emperor* v. *Panchu Das*, (1920) 47 Cal 671, F B

makes admissible in evidence things said or done by a conspirator in reference to the common design. It applies to crimes as well as torts, *i e*, to joint offenders as well as joint tort-feasors. It has no bearing on the question as to how far a conspiracy to commit an offence or actionable wrong is an offence under the Indian Penal Code. It is based upon the principle that, when several persons conspire to commit a crime or a tort, each makes the rest his agents to carry the plan into execution.

Confession.—A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members, is not admissible under this section against the co-conspirators jointly tried with him, but only under s. 30 [1] The statement of an accused, made after arrest, and not amounting to a confession, is not admissible in evidence against a co-accused under this section.[2]

English law.—This section is wider than the English law which requires the acts or declarations to have been done or said in the execution or furtherance of the common purpose. Under the English law, therefore, if the acts and declarations of other conspirators were not in furtherance of the common purpose or were done or made after the person against whom the evidence is to be given had severed his connection with the conspiracy, they will not be relevant against him. Under this section acts done after the termination of the conspiracy are also relevant.

Agreement but not direct meeting is necessary.—Though to establish the charge of conspiracy, there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence, the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. So again it is not necessary that all should have joined in the scheme from the first: those who come in at a later stage are equally guilty, provided the agreement be proved.[3]

Existence of conspiracy being established, sayings and doings of conspirators, though in absence of each other, are evidence against fellow-conspirators [4]

CASES.

On a trial for forgery, a letter written by a person, who had no hand in the forgery, to his brother, a stranger to the transaction, was produced. The writer of the letter was not examined; but the letter was allowed to go in under this section. It was held that the letter was not admissible under this section in the absence of evidence that its writer was a conspirator in the fabrication of the will.[5]

[1] *Emperor* v. *Abani Bhushan Chuckerbutty*, (1910) 38 Cal. 169

[2] *Sital Singh* v. *Emperor*, (1918) 46 Cal. 700.

[3] Per Jenkins, C J., in *Barindra Kumar Ghose* v. *Emperor*, (1909) 37 Cal 467, 507.

[4] *Saya Kye* v *Queen-Empress*, (1802-96) 1 U B R 148

[5] *Emperor* v *Keshav Narayan*, (1913) 25 Bom. L. R. 248.

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.[1]

Illustrations

(*a*) The question is whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant

(*b*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

COMMENT.

Under this section, any fact which either disproves or tends to prove or disprove any claim or charge in a case is made relevant. The effect of this and the previous section is to make every relevant fact admissible as evidence. Thus, where the question is whether X lent money to Y, evidence of the property of X about the time of the alleged loan is admissible as tending to disprove it. Similarly, where the question is, whether X is the child of Y, evidence of the resemblance, or want of resemblance, of X to Y is admissible. In *Reg.* v. *Parbhudas*,[1] West J. said:—" Section 11 of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far-[illegible]

That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself. The illustrations to s. 11 do not go beyond familiar cases in the English law of evidence."

In order that a collateral fact may be admissible as relevant under this section there are two requirements:

1 (1874) 11 B H. C. 90, 91; *Emperor* v *Panchu Das*, (1920) 47 Cal. 671.

(1) that the collateral fact must itself be established by reasonably conclusive evidence; and

(2) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.[1]

Thus, where the question in issue was whether possession was duly given of certain immovable properties under a deed of gift, so as to make it complete and valid under the Mahomedan law, it was held that, if the deed of gift must be held to have operated

Under certain circumstances, in certain cases, the judgment in a previous suit to which one of the parties in the subsequent suit was not a party, may be admissible in evidence, for certain purposes and with certain objects in the subsequent suit.[3] Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property.[4]

As a general rule, this section is controlled by s. 32 where the evidence consists of statements of persons who are dead or who cannot be found, but this rule is subject to certain exceptions. The test, whether the statement of a person who is dead or who cannot be found is relevant under s. 11 and admissible under that section (presuming that it is in other respects within the intention of the section) although it would not be admissible under s. 32, is this. It is admissible under s. 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the thing said in under s. 11, then the case is outside s. 32.[5]

1. 'Highly probable or improbable.'—These words point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co-existence of the two highly probable.[6]

1 *Khaver Sultan* v. *Rukha Sultan*, (1904) 6 Bom. L. R. 983.

2 *Khaver Sultan* v. *Rukha Sultan*, (1904) 6 Bom. L. R 983, 985

3 *Tepu Khan* v *Rajani Mohun Das*, (1898) 25 Cal 522, F B., holding [illegible] *Narain Singh*, (1894) 22 I. A. 60 and *Bitto Kunwar* v. *Kesho Pershad*, (1897) 24 I. A 10

4 Per Ranade, J., in *Lakshman* v. *Amrit*, (1900) 24 Bom 591, 599

5 *R. D Sethna* v. *Mirza Mahomed Shirazi*, (1907) 9 Bom. L. R 1047.

6 *Empress* v. *M. J. Vyapoory Moodeliar*, (1881) 6 Cal. 655, 662.

On the question whether certain leases were perpetual, it was held that the fact, that the intention indicated by the acts and conduct of the parties was to make certain other leases, granted at about the same time, under similar circumstances, perpetual, would make it highly probable that the same was the intention with regard to the leases in dispute, and that the facts relating to these leases would be relevant facts under s. 11, cl. 2 [1]

CASES.

The plaintiff brought a suit against several defendants to prevent encroachments by the defendants in a lane which was the common property of himself and the defendants It was held that the admission of one of the defendants in a previous suit to which the other defendants were not parties as to the common character of the portion of the lane between his house and the plaintiff's, and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff

In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property, it was held in the subsequent suit that the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical [3]

Where the plaintiffs and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence, it was held that the documents were admissible against those defendants under s. 11, cl. (2) and s. 21, cl. (3).[4]

In proceedings for probate of a will, a witness, who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to a disposition of her ornaments by will. This question was disallowed. It was held that the question was improperly disallowed, since a statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would, therefore, be admissible as evidence under this section.[5]

1 *Narsingh Dyal Sahu v. Ram Narain Singh*, (1903) 30 Cal 883, 896

2 *Naro Vinayak v. Narahari*, (1891) 16 Bom. 125

3 *Tepu Khan v. Rajani Mohun Das*, (1898) 25 Cal. 522, F. B.

4 *Gjannessa v. Mobarakannessa*, (1897) 25 Cal 210

5 *Nana bin Krishnaji v. Shanker bin Nagappa*, (1901) 3 Bom L. R. 465

When the question is whether a person is a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert is relevant, and it is open to the prosecution to prove against each person that the members of the gang do cheat.[1]

Facts inconsistent with a fact in issue.—The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross-examined on the point [2]

A letter written by an accused, when self-disserving, is *prima facie* evidence against him if it relates distinctly to a relevant point. It is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened. An unsigned letter, proved to have been written by the accused, addressed to a firm in London, which had shipped certain contraband cocaine which the accused was charged with importing into Bengal, was held to be admissible in evidence, though intercepted under the order of the Magistrate at the Post Office during the course of transit A letter written by the exporter of certain contraband cocaine, the subject of the charge against the accused, containing a reference to a telegram signed in a different name but bearing the same business address as that of the accused, was held to be relevant [illegible] sender of the [illegible] Office under [illegible]

In suits for damages, facts tending to enable Court to determine amount, are relevant

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

COMMENT.

This section enables the Court to admit any facts which will help it to determine the amount of damages which ought to be awarded to a party. When damages are claimed in a suit, the amount of the damages is a fact in issue.

Damages are the pecuniary satisfaction which the plaintiff may obtain by success in an action. They are limited to the loss which the plaintiff has actually sustained.

[1] *Kalu Mirza* v. *Emperor*, (1909) 7 Cal 91

[2] *Reg* v. *Sakharam Mukundji*, (1874) 11 B H C 166.

[3] *Booth* v *Emperor*, (1913) 41 Cal. 545.

Under this section it may be laid down generally that evidence tending to determine, *i e*, to increase or diminish, the damages, is admissible though not expressly involved in issue. Thus, in an action for breach of promise of marriage, plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; nor for malicious prosecution. But the evidence of the amount of damage, which is the necessary and obvious result of the defendant's breach of contract, or of his tort, may be proved, though only alleged generally in the plaint.[1]

Section 73 of the Indian Contract Act lays down the rule governing damages in actions of contract

Section 55 of the Indian Evidence Act lays down the conditions under which evidence of character may be given in civil cases with a view to damages.

Facts relevant when right or custom is in question

13. Where the question is as to the existence of any right[1] or custom,[2] the following facts are relevant:—

(*a*) any transaction[3] by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence:

(*b*) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is whether A has a right to a fishery A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

COMMENT.

The cases this section is intended to meet are those in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, where transactions may be supposed to have gone on modifying, asserting, denying, creating, recognizing it, or being inconsistent with its existence, leaving it, after all that has been given in evidence, fair matter for judicial consideration, as to whether the Court should or should not decree it.

To satisfy the requirements of this section the question must be as to the existence of a right or custom.[2]

[1] Norton, 124.
[2] Per Beaman, J., in *Mahamad v Hasan*, (1906) 31 Bom. 143, 153; 9 Bom. L. R 65, 74.

1. 'Right.'—The rights contemplated by this section are plainly conceived as admitting of proof by cumulative instances and transactions, and not by a single and decisive and final way, namely, the terms of a document. The whole context indicates [illegible] may be [illegible] 'right' [illegible] not only incorporeal rights but 'a right of ownership.'[2] This is the view of the Bombay, Madras and Allahabad High Courts. The Calcutta High Court has, however, held that the term 'right' includes only incorporeal rights.[3] But the decisions of the Calcutta High Court are not unanimous on the point.[4]

The section is not confined to public rights but covers private rights also, *e.g.*, see the illustration to the section.

2. 'Custom.'—Custom is a rule which, in a particular family or in a particular district, has, from long usage, obtained the force of law. A custom to be recognized by a Court should be—

(1) ancient,
(2) continuous and uniform,
(3) reasonable,
(4) certain,
(5) compulsory and not optional,
(6) peaceable, and
(7) not immoral.

The customs which will be recognized under the Act will be—

(1) general, *e.g.*, customs common to a class of people living in the same district or belonging to the same caste or community;

(2) public, *i e*, any custom which is a matter of public interest,

(3) private, *e g.*, family customs and usages The burden of proving a custom lies on the party setting it up.

In order to prove a custom—

(1) "The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those *following it that they were acting in accordance with law*, and this conviction must be inferred from the evidence.

(2) "Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts [illegible] their beli[illegible] but it is [illegible] kind will [illegible] of the usage asserted."[5]

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[1] Per Beaman, J., in *Mahamad* v. *Hasan*, (1906) 31 Bom. 143, 154; 9 Bom. L. R. 65, 75.

[2] *The Collector of Gorakhpur* v. *Palakdhari Singh* (1889) 12 All 1, F.B; [illegible] (1892) 16 Mad 194; *Sabran Sheikh* v *Odoy Mahto*, (1922) 1 Pat. 375

[3] *Gujju Lall* v. *Fatteh Lall*, (1880) 6 Cal 171, F. B.

[4] See *Tepu Khan* v. *Rajani Mohun Das*, (1898) 25 Cal. 522, and [illegible] ment of Mitter, [illegible] in *Gujju Fatteh Lall*.

A trade usage or custom may be proved in the same way as a family custom, except that it is unnecessary to show that such a custom is either ancient or continuous A trade usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.[1]

3. 'Transaction.'—A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons.

The word 'transaction' in clause (*a*) and the words 'particular instances' in clause (*b*) have given birth to an array of conflicting rulings as to whether judgments not *inter partes* (between the same parties) are admissible as 'transactions' or 'particular instances'

A Full Bench of the Calcutta High Court decided in *Gujju Lall* v *Fatteh Lall*,[2] that a former judgment, which is not a judgment *in rem* under s. 41, nor one relating to matters of public nature under s. 42, is not admissible in evidence in a subsequent suit, either as *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them. In this case the ultimate determination of the right to possession of certain property depended on the admission in evidence of a judgment in a previous suit to which the plaintiff was no party, but where the present defendant was a plaintiff. The first Court allowed the plaintiff to put in evidence against the defendant the judgment in question. It was held that the former judgment was not admissible as it was not a 'transaction' and the right claimed was not a 'right' within the meaning of this section.

In a second Full Bench case the view expressed in the above case was confirmed.[3] But in a third Full Bench case[4] the Court observed that the principle laid down in the two above cases was materially qualified by the Privy Council,[5] and it held that under circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in a subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit. In this case, the previous suit was to recover a two-thirds share of the property in question and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property, the Full Bench held that

[1] *Juggomohun Ghose* v. *Manickchund*, (1859) 7 M. I. A. 263, 282.

[2] (1880) 6 Cal. 171, F. B.

[3] *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Choudhry*, (1886) 13 Cal 352, F. B

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1. **'Right.'**—The rights contemplated by this section are plainly conceived as admitting of proof by cumulative instances and transactions, and not by a single and decisive and final way, namely, the terms of a document. The whole context indicates that the section is dealing with continuing rights which may be interrupted without being necessarily destroyed. The term 'right' comprehends every right known to the law.[1] It includes not only incorporeal rights but 'a right of ownership.'[2] This is the view of the Bombay, Madras and Allahabad High Courts. The Calcutta High Court has, however, held that the term 'right' includes only incorporeal rights.[3] But the decisions of the Calcutta High Court are not unanimous on the point.[4]

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[2] *The Collector of Gorakhpur v. Palakdhari Singh* (1889) 12 All 1, F.B.; *Ranchhoddas Krishnadas v. Bapu* [illegible] (1892) 16 Mad 194; *Sabran Sheikh v. Odoy Mahto*, (1922) 1 Pat. 375.

[3] *Gujju Lall v. Fatteh Lall*, (1880) 6 Cal 171, F. B.

[4] See *Tepu Khan v. Rajani Mohun Das*, (1898) 25 Cal 522, and the judgment of Mitter, J., in *Gujju Lall v. Fatteh Lall*.

[5] *Gopalayyan v. Raghupatiayyan*, (1873) 7 M. H. C. 250, 254.

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in the subsequent suit the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical.

The Madras High Court[1] has approved of *Gujju Lall's case*. But in a suit brought by the trustees of a temple to recover from [illegible]

[illegible] had been decreed in favour of the trustees of the temple were relevant as being evidence of instances in which the right claimed had been asserted.[2] In a suit to establish the plaintiff's title to certain land, he put in evidence (1) a conveyance in favour of his father, (2) a sale certificate issued to his father's vendor, (3) an order made in certain execution proceedings in which was recited a petition by his father asserting his title, (4) a judgment obtained by his father in which his title was recognized. Neither the defendants nor their predecessors were parties to any of these instruments or proceedings. It was held that all these documents were relevant.[3] In a later case it was observed.—"We may point out that in *Gujju Lall* v. *Fatteh Lall*, the sole object for which it was sought to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right claimed, and it was held that the opinion expressed in the former judgment was not a relevant fact withir [illegible] In the case before us, it is not [illegible] to prove,—for the point was [illegible] judgment is tendered in evidence as proof that in a particular instance the plaintiff's predecessor acted in the capacity of Karnavan of a Marumakkatayom tarwad wholly irrespective of the particular decision arrived at in the suit. This, we think, is a relevant fact, and [illegible] 35 of the Evidence Act."[4] [illegible] a Full Bench case,[5] ques- [illegible] tion placed upon the words right and transaction in *Gujju Lall* v. *Fatteh Lall*, in so far as the exclusion of such judgments from being received as evidence under any section is concerned. In this case, P brought a suit against K, a Hindu widow, to establish his right of inheritance in certain villages which had belonged to K's husband, and to have it declared that her husband died childless, and that K had falsely put forward a child of unknown parentage as her husband's son. K was the only defendant, and she maintained that the child in question was her son by her deceased husband. The suit was

[1] *Subramanyan* v. *Paramasuaran*, (1887) 11 Mad. 116; *Ramasami* v. *Appavu*, (1887) 12 Mad. 9.

[2] *Ramasami* v. *Appavu*, (1887) 12 Mad. 9.

[3] *Venkatasami* v. *Venkatreddi*, (1891) 15 Mad. 12.

[4] *Byathamma* v. *Avulla*, (1891) 15 Mad 19, 23

[5] *The Collector of Gorakhpur* v. *Palakdhari Singh*, (1889) 12 All 1, F. B; 15 All. 261, P.C.

dismissed on the merits by the Court of first instance and by the High Court on appeal. After K's death P brought a suit against D, whom the Collector as Manager of the Court of Wards had accepted as the minor son of K, and against the Collector as such Manager, for possession of the same villages upon the same grounds as those put forward in the former suit. It was held that the judgments in the former suit did not operate as *res judicata* and were admissible in evidence. Edge C. J. and Tyrrell J. said: "The judgments were not admissible under s. 8 or s. 9 of the Evidence Act, nor was either of them a 'transaction' or a 'fact' within the meaning of s 13 But the record, and not the judgments alone, in the former suit was admissible under s 13 (*b*) independently of s 43, as evidence of a particular instance in which the alleged right of the plaintiff to the property now in suit was at that time claimed and disputed, the word "right" in both clauses (*a*) and (*b*) of s. 13 including a right of ownership, and not being confined, as held by the majority in *Gujju Lall* v. *Fatteh Lall*, to incorporeal rights. But the reasons given in the judgments in the former suit for the decree could not be considered in the present suit." Straight J. said "Under s. 43 of the Evidence Act the question was whether the *existence* of the former judgments was a fact in issue or relevant under some other provision of the Act. Here the question was not as to the *existence* of the former judgments and decrees as a fact in issue or relevant fact; but though s. 43 declared judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 irrelevant *qua*-judgments, orders and decrees, it did not make them absolutely inadmissible when they were the best evidence of something that might be proved *aliunde*. The former judgments and decrees were not themselves a 'transaction' or 'instances' within the meaning of s. 13; but the suit in which they were made was a transaction or an instance in which the defendant's right as the living son of K's husband to obtain proprietary possession of his father's estate was obtained and recognized, and to establish that such a transaction or instance took place, they were the best evidence." It having been alleged that the defendant was in reality one R, the defence attempted to use as evidence a judgment in a criminal case in which the defendant was prosecuted as R for causing simple hurt, and in which the Court had found that R had dic[illegible]
an [illegible]
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admissible in evidence. Straight J., with doubt, held on the principle that in cases of doubt a Judge should decide in favour of a[illegible]
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that he was not the person the plaintiff said he was, and that it

was therefore admissible under s. 9. Mahmood J., held that the judgment was admissible under s. 8 and, if not, under other sections.

The Bombay High Court has approved of the case of *Gujju Lall* v. *Fatteh Lall* in *Ranchhoddas Krishnadas* v. *Bapu Narhar*.[1] In *Ranchhoddas' case* the plaintiff sued to recover arrears of rent for a certain shop, alleging the annual rent to be Rs. 250. The defendant contended that it was only Rs. 60. The defendant and the plaintiff's brother were partners in business, and the plaintiff relied upon the evidence of his brother and on two entries in the firm's books in the writing of his brother. To prove the *bona fides* of these entries, the plaintiff tendered, in evidence, a judgment passed against the defendant in a suit brought by the defendant against the plaintiff's brother, charging him with having improperly debited their firm with Rs 250 as the rent of the shop. It was held that the judgment was not admissible as evidence against the defendant in the present suit.[2] In a subsequent case Ranade J., after referring to the various conflicting decisions of the different High Courts, said: "It is not easy to reconcile this conflict of views in particular instances, but apparently, the cases, which decide that judgments, not *inter partes*, are not admissible in evidence proceed chiefly on the ground that those judgments are sought to be used as having the effect, more or less, of *res judicata*. For that purpose, a judgment *inter partes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under s. 11 or 13 as exceptions recognized under s. 43, as relevant evidence. . . . . Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence, and may even shift the burden of proof."[3] In this case A, B and C were members of a joint Hindu family, each having a third share in the family estate. A assigned his interest in the joint estate to the plaintiffs, who in 1897 filed this suit to recover by partition their one-third share in the property. B and C pleaded that A had already relinquished his share in their favour by a release. The plaintiffs relied upon the judgments in a former suit brought by certain creditors of A to establish A's title to a third share in the property. In that suit it had been decided that the release relied upon by B and C was

[1] (1886) 10 Bom 439

[2] *Ranchhoddas Krishnadas* v *Bapu Narhar*, (1886) 10 Bom 439

[3] *Lakshman* v. *Amrit*, (1900) 24 Bom 591, 598, 599; 2 Bom. L. R. 386, 392, 393

a fraudulent and colourable transaction It was held that the judgments in the former litigation, though not *inter partes*, were admissible under this section.[1]

Where the judgments rejected by the lower appellate Court were not *inter partes* but were in suits brought by other creditors against the same defendants, in which the existence of the partnership denied in the present suit was asserted with success, it was held that the judgments were admissible in evidence and must be treated as relevant but not as conclusive as to the existence of the partnership[2] For a judgment to be admissible it is not in all cases necessary that it should be either a judgment *inter partes* or judgment *in rem*. A judgment not *inter partes* may not be proof of facts therein stated, yet it is admissible for the purpose of explaining the character in which possession of an estate has been enjoyed and matters of that class[3]

In a suit brought by the plaintiff for the recovery of a house [illegible]

appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bona fide*. On second appeal a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage, it was held by Russell J. that the proceedings in the mortgage suit were admissible as relevant evidence because the plaintiff and defendants, either by themselves or their predecessors, were parties to that suit. Beaman J. held that the judgment was admissible to prove that the genuineness of the plaintiff's sale-deed was then questioned, but it could not be used for any ulterior purpose.[4]

The Chief Court of the Punjab, following *Gujju Lall* v. *Fatteh Lall*, has held that the judgment in a former litigation in which the plaintiffs were not parties was not relevant under this or any other section.[5] If the former judgment is between the same parties, then the judgment is relevant and admissible in evidence.[6]

The Privy Council admitted certain decrees passed in 1817 and 1845 to which the plaintiff-Zamindar's predecessors-in-title were not parties, as evidence on behalf of the defendant's claim to ancient possession.[7] Similarly, a decree obtained against the defendant that the will was revoked was held not to be *res judicata* in a suit against him brought by other plaintiffs, but was

[1] *Lakshman* v. *Amrit*, (1900) 24 Bom 591; 2 Bom. L R. 386.

[2] *Govindji Jhaver* v *Chhotalal Velsi*, (1900) 2 Bom L. R. 651.

[3] *Dharnidhar* v. *Dhundiraj*, (1903) 5 Bom. L. R. 230.

[4] *Mahamad* v. *Hasan*, (1906) 31 Bom 143. 9 Bom L. R 65

[5] *Sobha Singh* v. *Nand Singh*, (1906) P. R. No 56 of 1906; *Indar Singh* v. *Fateh Singh*, (1920) 1 Lah. 540

[6] *Lachman Gir* v. *Lahar Gir*, (1875) P. R. No 70 of 1875.

[7] *Ram Ramjan Chuckerbutty* v. *Ram Narain Singh*, (1894) 22 I A. 60; 22 Cal. 533, P. C.

held to be admissible in evidence against him.[1] In a case the Privy Council has held that Police orders made to prevent breaches of the peace in cases of dispute as to immoveable property are admissible in evidence under this section to show the fact that such orders were made. This necessarily makes them evidence of the facts appearing on the orders themselves, *viz.*, who the parties to the dispute were, what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against anyone, when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, *i.e.*, the testimony of persons who know the locality. If the order refers to a map, that map is admissible in evidence to render the order intelligible, and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of the sort, be ascertained by extrinsic evidence.[2]

The result of all the decisions appears to be that judgments are not *prima facie* admissible, but when the fact of litigation is relevant, the plaint should be admitted as an assertion of the right and the written statement as a denial of it and with them the judgment to show how far the litigation and the consequent assertion or denial of the right went. The judgment is not evidence of the judicial decision expressed therein, but the fact whether the assertion was successful or unsuccessful in a number of cases can hardly fail to have some bearing on the decision of the Court even though the judge is legally bound to disregard such judicial opinion.[3]

CASES.

In deciding a suit for damages arising from a malicious prosecution, the Judge treated the judgment of the Magistrate and the evidence given before the Magistrate, in the prosecution complained of, as evidence in the case And looking at the judgment of the Magistrate as being a record of the facts found, the Judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed; and decreed the plaintiff's claim. On appeal, it was held that it was not permissible to the Judge to utilise the judgment of the Magistrate in the way he did; and that ss. 43, 13 or 11 of the Evidence Act did not apply to the case.[4]

In a suit for possession of land, the plaintiffs claimed title under a lease from the Shrotriemdars of the village where the

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[2] *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*, (1901) 29 Cal. 187, P. C.

[3] Field, 7th Edn, p 34

[4] *Gulabchand* v. *Chunilal*, (1907) 9 Bom L R. 1134

land was situated. The defendants, who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent occupancy rights, and asserted that the Shrotriemdars were entitled not to the land itself but to Melvaram only. To meet this allegation the plaintiffs tendered in evidence documents executed by other tenants in the same village showing that they were Purakudis merely. The defendants had received no notice to quit before suit. It was held (1) that the documents above referred to were admissible under s. 13, (2) that the plaintiffs were entitled to eject the defendants without proof of notice to quit, as it did not appear that the latter were in possession as tenants at the time when the suit was filed [1]

Facts showing existence of state of mind, or of body, or bodily feeling.

14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

Illustrations.

(*a*) A is accused of receiving stolen goods knowing them to be stolen It is proved that he was in possession of a particular stolen article

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen

(*b*) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

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(*k*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts

(*l*) The question is, whether A's death was caused by poison

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(*n*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant

(*o*) A is tried for the murder of B by intentionally shooting him dead

The fact that A on other occasions shot at B is relevant as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant

(*p*) A is tried for a crime

The fact that he said something indicating an intention to commit that particular crime is relevant.

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COMMENT.

When the existence of a mental or bodily state or bodily feeling is in issue or relevant, then the facts from which the existence of such mental or bodily state or bodily feeling may be inferred are relevant. See the illustrations Illustrations (*e*), (*i*) and (*j*) deal with *intention*, (*a*), (*b*), (*c*) and (*d*) with *knowledge*; (*f*), (*g*) and (*h*) with good *faith*; (*n*) with *negligence and knowledge*; (*k*), (*l*) and (*m*) with *mental and bodily feeling*. To explain states of mind evidence is admissible though it does not otherwise bear upon the issue to be tried.

This section consists of the collection of cases in which the strict rules of evidence are somewhat relaxed by the admission of collateral circumstances, where it is necessary to show a particular state of mind. Where a man is on his trial for a specified crime, such as uttering a forged note or coin or receiving an article of stolen property, the issue is whether he is guilty of that specific act. To admit, therefore, as evidence against him other instances of a similar nature, is clearly to introduce collateral

(*c*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to V, are relevant

(*d*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew that the payee was a fictitious person

(*e*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B

(*f*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(*g*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving tha A did, in good faith, make over to C the management of the work in question so that C was in a position to contract with B on C's own account, and not as agent for A

(*h*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believ that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith

(*i*) A is charged with shooting at B with intent to kill him In order to show A's intent the fact of A's having previously shot at B may be proved.

(*j*) A is charged with sending threatening letters to B. Threatening letter previously sent by A to B may be proved, as showing the intention of the letters.

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matter. This cannot be with the object of inducing the jury to infer that, because the accused has committed a crime of a similar description on other occasions, he is guilty of the present; but to anticipate the defence that he acted innocently and without any guilty knowledge, or that he had no intention or motive to commit the act.[1]

The principle on which evidence of similar acts is admissible is not to show that, because the defendant has committed one crime, he would therefore be likely to commit another, but to establish the *animus* of the act, and rebut, by anticipation, the defences of ignorance, accident, mistake or some innocent motive or intention.[2]

This section and s. 15 deal with evidence as to the state of mind or body of the defendant. Intention, knowledge and similar other states of mind are matters of cogent inquiry in criminal cases; in civil cases they are very material, *e.g.*, in cases of malicious prosecution, fraud, negligence, etc.

Scope.—This section applies to cases "where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as for instance in actions of slander or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations....show with sufficient clearness the sort of cases in which this evidence is receivable. But I think we must be very careful to extend the operation of the section to other cases, where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. We have no right to prove that a man committed theft or any other crime on one occasion, by shewing that he committed similar crimes on other occasions."[3]

In *Reg.* v. *Parbhudas*,[4] West J. said: "The possession by an accused of several other articles deposed to have been stolen, would, no doubt, have some probative force on the issue of whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which he denied altogether, yet, in the first illustration to s. 14, it is set forth as a preliminary to the admission of testimony as to the other articles that 'It is proved that he

[1] Norton, 131.
[2] Phipson, 153
[3] Per Garth, C. J., in *Empress* v *M. J Vynpoory Moodeliar*, (1881) 6 Cal 655, 659: *Nga Po So* v. *King-Emperor*, (1907-1909) 1 U. B R. (Evi) 1.
[4] (1874) 11 B H.C 90, 91.

was in possession of [the] particular stolen article.' The receipt and possession are not allowed to be proved by other apparently similar instances, only the guilty knowledge which can be inferred satisfactorily through a conscious or unconscious application of the law of probabilities from a multiplication of the fractions

the person murdered, evidence of the accused's intention, but not of the act that caused the death ; yet it is certain that on the issue of whether A actually shot B or not, the fact that he had previously shot at him, would have some probative force ; so, too, would proof of a general malignity of disposition by evidence[1] that A was in the habit of shooting at people, with intent to murder them,' yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue, or as

documents apparently forged, or held in readiness for the purpose of forgery, were found in the prisoner's possession was not admissible.[1] In distinguishing this decision in a subsequent case the same learned Judge observed. "The possession of documents of unknown character is a common occurrence, and they could not be pronounced forgeries without a trial of the fact. If the papers, however, had all been of an identical and peculiar pattern, that would have afforded some ground of inference under particular circumstances."[2] Evidence of the possession and attempted disposal of coins of unusual kind was therefore considered relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering was denied[3] Similarly, where the accused was charged under s 206 of the Indian Penal Code with fraudulently transferring three properties to three different persons on a certain day, in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, and apparently with the same object, this evidence was admissible to prove either that all those transfers were parts of one entire transaction or that the particular transfers which were specified in the charge were made with a fraudulent intent.[4]

Though it is not competent to a prosecution to prove a man guilty of one felony by proving him guilty of another unconnected felony, but where several felonies are connected together and form part of one entire transaction, the one is evidence to

[1] (1874) 11 B H C 90

[2] *Queen-Empress* v *Nur Mahomed*, (1883) 8 Bom 223, 226

[3] *Queen-Empress* v *Nur Mahomed*, (1883) 8 Bom 223

[4] *Queen-Empress* v. *Vajiram*, (1892) 16 Bom 414.

show the character of the other.[1] Thus, inferences from one transaction to another which is not specifically connected with it, should not be drawn merely because the two may resemble each other; they must be linked together by the chain of cause and effect in some assignable way, before the inference can be drawn.[2] Similar facts, though often of cogent moral weight, that is logically relevant, are rejected as legal evidence on grounds of convenience, since they tend to embarrass the inquiry with collateral issues and prejudice the parties. When evidence of similar facts is admitted, it is done so on the ground of establishing the *animus* of the act and rebut, by anticipation, the defences of ignorance, accident, mistake, etc. To prove the guilty knowledge of an utterer of a forged bank note, evidence may be given of his having previously uttered other forged notes knowing them to be forged.[3]

Explanation 1.—Illustrations (*n*), (*o*) and (*p*) explain the purport of this explanation. Under this explanation evidence of general reputation is excluded. The evidence relating to the state of mind of a person must show that the state of mind exists not generally but in reference to the particular matter in question. Evidence of general disposition, habit or tendencies is inadmissible.[4] Anything having a distinct and immediate reference to the particular matter in question is admissible.[5] See illustrations (*a*) and (*b*).

Explanation 2.—This explanation distinctly states that, where the previous commission of an offence is relevant, the previous conviction of such person should also be a relevant fact. This explanation is a particular application of the general rule contained in the section itself. Previous conviction becomes relevant when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant.[6] See illustrations (*e*) and (*f*) to s. 43.

CASES.

On the trial of a man and his wife for the murder of his mother by poison, the female prisoner having lived as servant in the family during the life of her husband's former wife, evidence was admitted of the circumstances under which the former wife had died of poison.[7]

[1] *The King* v. *Ellis*, (1826) 6 B. & C. 145.

[2] Stephen's Dig.

[3] *The King* v. *Sarah Whiley*, (1804) 2 Leach 983.

[4] See *Emperor* v. *Gangaram*, (1920) 22 Bom. L. R. 1274.

[5] *Emperor* v. *Debendra Prosad*, (1909) 36 Cal. 573.

[6] *Emperor* v. *Alloomiya Husan*, (1903) 28 Bom 129; 5 Bom L. R. 805. See *Wazir* v. *Queen-Empress*, (1895) P. R No 7 of 1895 (Cr); *Nga Shwe* [illegible]

I

L

F 681.

Explanation 1.—Where the accused were charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity, evidence of previous conviction of theft or of an order for giving security as the accused habitually committed thefts was held inadmissible on the ground that such evidence did not indicate an intention to commit the particular crime of which the accused were charged[1]

Explanation 2.—Where a person was charged with the offence of belonging to a gang of persons associated with the purpose of habitually committing dacoity, it was held that proof of previous conviction was admissible having regard to the character of the offence attributed to the accused[2] A warrant was issued for the arrest of the accused under the Bombay Prevention of Gambling Act. In execution of this warrant, when the police entered into his room, no actual play was seen, but there were found playing cards on the ground, and ten persons including the accused were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house. Amongst other facts he took into consideration the previous convictions of the accused under the Gambling Act. On appeal, it was held that the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention[3]

Facts bearing on question whether act was accidental or intentional

15. When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(*a*) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental

(*b*) A is employed to receive money from the debtors of B It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

[1] *Emperor* v. *Haji Sher Mahomed*, (1921) 25 Bom L. R. 214

[2] *Empress* v. *Naba Kumar Patnaik*, (1897) 1 C. W. N. 146.

[3] *Emperor* v. *Alloomiya Husan*, (1903) 28 Bom 129, 5 Bom. L. R. 805.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c*) A is accused of fraudulently delivering to B a counterfeit rupee

The question is, whether the delivery of the rupee was accidental

The facts that, soon before or soon after the delivery to B, A' delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental

COMMENT.

This section is an application of the general rule laid down in s 14, and the words of the section as well as of illustration (*a*) show that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of *similar* occurrences.[1]

In this section, as in s. 14, the intention of the party is taken into account. But if there is no common link between the fact to be proved and the evidentiary fact, they cannot form a series. A regular system worked by the common intention should be proved.

Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.

Whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind and proximate in time to the conduct in question.[2]

CASES.

Murder.—Where prisoners had been convicted of the wilful murder of an infant child which they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence showed had been found buried in the garden of a house occupied by them, the Court admitted evidence that several other infants had been received by the prisoners from their mothers on like representations and on like terms and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners.[3] Similarly, where the Court had to decide whether a person was maliciously shot or whether the shooting was accidental, proof that the prisoner had at another time shot at the same person was considered relevant.[4]

[1] *Emperor* v. *Debendra Prosad*, (1909) 36 Cal. 573 See also *Emperor* v. *Panchu Das*, (1920) 47 Cal 671, F.B.

[2] *Amrita Lal Hazra* v. *Emperor*, (1915) 42 Cal. 957.

[3] *Makin* v. *Attorney-General for New South Wales*, [1894] A C. 57.

[4] *Rex* v. *Samuel Voke*, (1823) R. & R. 531.

Where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.[1] Upon the trial of a prisoner for the murder of her infant by suffocation in bed, it was held that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which those children died.[2]

Arson.—Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident [3]

Cheating.—On the trial of an indictment for endeavouring to obtain an advance from a pawn-broker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawn-broker upon a chain which he represented to be a gold chain, but which was not so, and endeavoured to obtain from other pawn-brokers advances upon a ring which he represented to be a diamond ring but which, in the opinion of the witnesses, was not so. This ring was not produced It was held that the evidence was properly admitted.[4]

On a charge against the accused of cheating by falsely representing that he was the agent of an estate and could procure for the complainant appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was held to be admissible under this section not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.[5]

A person employed as a clerk in charge of the renewal of licenses for hand-carts received Rs. 2 for each such renewal, whereas he ought to have taken Rs. 1-14. He was charged with cheating, and evidence was produced showing that he had taken two annas in excess from persons other than those named

1 *Reg* v *Cotton*, (1873) 12 Cox 400
2 *Reg* v *Roden*, (1874) 12 Cox 630
3 *Regina* v *Gray*, (1866) 4 F. & F. 1102
4 *The Queen* v *Francis*, (1874) L R 2 C C. R 128.
5 *Emperor* v. *Debendra Prosad*, (1909) 36 Cal 573. *Emperor* v. *Yakub Ali*, (1916) 39 All. 273

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5 *Emperor* v. *Debendra Prosad*, (1909) 36 Cal. 573; *Emperor* v. *Yakub Ali*, (1916) 39 All. 273

in the charge. It was held that such evidence was inadmissible either under s. 14 or under this section.[1]

P introduced himself as a Raja's son to a prostitute who passed into his keeping. He then introduced G as his door-keeper and both visited her house till the night of the 9th December, 1914, when she was found next morning to have been murdered and robbed. The accused were tried on charges of murder, conspiracy to rob, theft, and abetment of each other in the commission of the theft and murder. It was held that evidence that P had similarly introduced himself as a wealthy man, in 1915 and 1918, to three other prostitutes who each became his mistress, that he then introduced G as his door-keeper, that both visited the women and suddenly disappeared, and that their disappearance was followed by discovery, by the women, in each case, of the loss of their money or ornaments, was not admissible under s 9, 14 or 15. Section 9 did not apply for the purpose of proving identity as the murder and theft took place in December 1914 and the subsequent incidents in 1915 and 1918. Section 14 was not applicable, as the evidence of the subsequent occurrences did not show the state of mind of the accused towards the murdered woman. The first explanation and ills (*i*), (*j*) and (*o*) to that section excluded such evidence. Section 15 was not applicable as there was no question of the acts of murder and theft being accidental or intentional or done with a particular knowledge or intent, but that they were plainly intentional. Evidence of the subsequent incidents was also not admissible under s. 11[2]

Miscarriage.—Upon the trial of an indictment for "feloniously and unlawfully using a certain instrument, to wit, a quill, with intent to procure a miscarriage," the Court held that it was relevant, in order to prove the intent, to show that at other times, both before and after the offence charged, the prisoner had caused miscarriages by similar means.[3]

Existence of course of business, when relevant

16. When there is a question whether a particular act was done, the existence of any course of business,[1] according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

[1] *Emperor* v. *Abdul Wahid Khan*, (1911) 34 All. 93.

[2] *Emperor* v. *Panchu Das* (1920) 47 Cal 671

[3] *Reg.* v. *George Dale*, (1889) 16 Cox 703.

(*b*) The question is, whether a particular letter reached A The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

COMMENT.

Under this section the ordinary course of a particular business is proved and the Court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule. For instance, if letters properly directed to a gentleman be left with a servant it is only reasonable to presume *prima facie* that they reached his hands. Section 114, illustration (*b*), lays down that the Court may presume that the common course of business has been followed in particular cases. This presumption is an application of the general maxim *omnia præsumuntur rite essa acta* (all acts are presumed to be rightly done), and is based on the fact that the conduct of men in official and commercial matters is, to a great extent, uniform. In such cases there is a strong presumption that the general regularity will not, in any particular instance, be departed from.

1. 'Course of business.'—This must mean the ordinary course of a professional avocation or mercantile transaction or trade or business. The section covers both private and public offices. Illustration (*a*) relates to the former; illustration (*b*) to the latter, *viz*, the post office.

CASES.

Registered letters.—It has been held that the person refusing a registered letter sent by post cannot afterwards plead the ignorance of its contents [1] Similarly, if a letter is put into a post office, that is *prima facie* evidence, till rebutted, that the addressee received it in due course The post marks on letters are considered as evidence of the dates and places mentioned thereon. Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it had been despatched; and on the cover there was an endorsement purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter, it was held that this was sufficient service of notice.[2]

Press copy of a letter.—A press copy of a letter was admitted by the District Court for the purpose of proving that a notice of allotment of shares had been duly communicated to the defendant. No notice to the defendant to produce the original letter appeared

[1] *Loolf Ali Meah* v *Pearee Mohun Roy*, (1871) 16 W R. 223.

[2] *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar*, (1888) 15 Cal. 681.

on the record. There was no evidence as to the posting of the original letter or of the address which it bore; all that was proved was that the press-copy was contained in the press-copy letter-book of the company, and that it was in the handwriting of a deceased secretary of the company, whose duty it was to despatch letters after they had been copied in the letter-book. The defendant denied having received any letter or notice of allotment. It was held that the press-copy letter was inadmissible for the purpose of proving due communication of the notice of allotment.[1]

ADMISSIONS.

Admission defined

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

COMMENT.

An 'admission' is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. Admissions are admitted because the conduct of a party to a proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue

It is immaterial to whom an admission is made. An admission made to a stranger is relevant. Admissions are as much binding on the Crown as ordinary persons. In English law the term 'admission' is used in civil cases; whereas the term 'confession' is used in criminal cases as acknowledgment of guilt. This distinction is not maintained in this Act and ss. 17 to 22 are applicable to civil as well as criminal cases. The word 'confession' has not been defined anywhere. A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime.[2] Confession would include an admission of criminating circumstances. Thus a confession is one species of admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him, or some fact essential to the charge. Confession to be admissible in evidence must be voluntary.

Every admission made by an accused person is not in the view of the law a confession, nor can it be held that admissions mean only statements made by parties to civil proceedings, and

[1] *Ram Das Chakarbati* v. *The Official Liquidator of the Cotton Ginning Company, Ltd., Cawnpore,* (1887) 9 All 366.

[2] *Queen-Empress* v. *Babu Lal,* (1884) 6 All. 509, 539, F. B.

do not include statements made by parties in criminal proceedings. Every statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact made by an accused person is an admission under ss. 17 and 18, and under s. 21 an admission may be proved as against the person who makes it unless, under some provision of the Evidence Act or other law, it is rendered inadmissible. Under ss. 24-26 statements made by accused persons are inadmissible, subject to the provisions of ss 27-29, when such statements are confessions.[1] A confession which is inadmissible may yet for other purposes be admissible as an admission under s. 18 against the person who makes it in civil matters.[2] Thus, admission of guilt by a person to a police officer, though not receivable in evidence in the criminal trial, may be proved in civil proceedings as an admission under ss 17, 18 and 21.[3]

Admissions may be oral or contained in documents, *e.g.*, letters, depositions, affidavits, plaints, written statements, deeds, receipts, horoscopes Admissions may be implied from the acquiescence of a party. The general rule is that admissions are admissible against the party making them and not against any other party. The exceptions to this rule are mentioned in ss. 18 to 20.

Admission by party to proceeding or his agent,

18. Statements made by a party to the proceeding,[1] or by an agent[2] to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character;

Statements made by parties to suits suing or sued in a representative character,[3] are not admissions, unless they were made while the party making them held that character.

by party interested in subject-matter;

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested,[4] or

1 *Ilahi Bakhsh* v *The Empress*, (1886) P. R No 16 of 1886 (Cr); *Raj Mal* v. *The Empress*, (1879) P. R. No. 3 of 1880 (Cr.); *Shere Singh* v *The Empress*, (1881) P R No 21 of 1881 (Cr.)

2 *Queen-Empress* v. *Tribhovan*, (1884) 9 Bom. 131, 134.

3 *Bishen Das* v *Ram Labhaya*, (1915) P R. No 106 of 1915.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,[5]

by person from whom interest derived

are admissions, if they are made during the continuance of the interest of the persons making the statements.

COMMENT.

Sections 18 and 19 indicate the persons by whom an admission must be made.

Section 18 lays down five classes of persons who can make admissions—

(1) Party to a proceeding.

(2) Agent authorised by such party.

(3) Party suing or sued in a representative character making admissions while holding such character.

(4) Person who has any proprietary or pecuniary interest in the subject-matter of the proceeding during the continuance of such interest.

(5) Person from whom the parties to the suit have derived their interest in the subject-matter of the suit during the continuance of such interest.

(1) **'Party to a proceeding.'**—A statement made by a party in a former suit between the same or different parties is admissible. The proceeding may be civil or criminal.

When several persons are *jointly* interested in the subject-matter of the suit, the general rule is that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately; provided the admission relates to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.[1]

(2) **'Agent.'**—The admissions of an agent are admissible because the principal is bound by the acts of his agent done in the course of business and within the scope of his authority. A statement made by an agent whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized to make it, is admissible though not on oath.[2] Before the statements of an agent can be relevant as admissions, the fact of agency must be proved. The managing member of a joint Hindu family is the agent of the family. He may acknowledge debts though he cannot revive a debt already time-barred. His acts are binding on the other members.

[1] Taylor, 11th Edn., s. 743, p. 512.

[2] *Govindji* v. *Chhotalal*, (1900) 2 Bom. L. R. 651.

Counsel Pleader, Attorney.—Admissions of facts made by a counsel or a pleader in the conduct of a suit on his client's behalf are binding on the client.[1] But a party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law.[2] An admission by a counsel or a pleader on a point of law cannot bind the client.[3] A pleader cannot give up any portion of his client's case without express authority, nor is he entitled to admit the claim of the other party. The admissions of a party's solicitors before the commencement of litigation are not relevant.

Co-defendants.—An admission or a confession of judgment by one of several defendants in a suit is no evidence against another defendant. No defendant can, by an admission or consent, convey the right, or delegate the authority to one, for more than his own share in property.[4]

Partner.—*Partners are agents of one another so far as the business of partnership is concerned.* Where several persons are engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence against the others.[5] Each member of a firm, being the agent of the others for all purposes within the scope of the partnership business, admissions by one are binding on all. Section 21 of the Indian Limitation Act is, to a certain extent, an exception to this rule.

Principal and Surety.—"The admissions of a *principal* can sometimes (but only seldom) be received as evidence in an action *against the surety* upon his collateral undertaking. In these cases the main inquiry is, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*.[6]"

Guardian.—The admissions of a guardian *ad litem*, or next friend, do not bind the minor. The guardian of an infant has no power to bind him by admissions. It has been held by the Bombay and Madras High Courts that a guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability in respect of, or pay in part, the principal of, a debt, so as to extend the period of limitation against his ward, provided the guard-

[1] *Jagapati Mudaliar* v. *Ekambara Mudaliar*, (1897) 21 Mad. 274; *Jang Bahadur Singh* v. *Shankar Rai*, (1890) 13 All. 272, F B.

[2] *Narayan* v. *Venkatacharya*, (1904) 6 Bom. L R. 434.

[3] *Krishnaji* v. *Rajmal*, (1899) 24 Bom 360, 2 Bom. L. R. 25

[4] *Lachman Singh* v. *Tansukh*, (1884) 6 All. 395; *Azizullah Khan* v. *Ahmad Ali Khan*, (1885) 7 All 353

[5] *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi*, (1885) 11 Cal. 588.

[6] Taylor, 11th Edn., s. 785, p. 532.

ian's act was for the benefit of the ward's property.[1] The Calcutta High Court holds a contrary view.[2]

(3) Party suing and sued in a representative character.— The above means trustees, executors, administrators, managers in the character of an executor or administrator or the assignee of a bankrupt.

It is important that such persons must make 'the statement in their character of persons so interested.' A statement made by a trustee, executor or administrator is not admissible against him when sued as trustee, etc., if it was made before he became trustee, etc. This principle is grounded on the fact that a statement against the interest of a person making it will not be made unless truth compelled it But the fact that two persons have a common interest in the subject-matter does not entitle them to make admissions, respecting it, as against each other[3] Thus, the admissions by one defendant will not be relevant against a co-defendant, because it would be unjust to bind a co-defendant by *the admission of another whom he has had no opportunity to* answer or cross-examine; it would afford to the plaintiff opportunities of defeating his opponent by unfair means. Even a confession of judgment by one of several defendants is no evidence against another defendant.[4]

(4) Person who has any proprietary or pecuniary interest.— When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.[5]

An admission made by one of several parties in fraud of the others jointly interested will not bind the others.

(5) Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit.—Statements made either by parties interested or by persons from whom the parties to the suit have derived their interest are admissions only if they are made during the continuance of the interest of the persons making the statement. A statement by a person who has parted with his interest in property is of no evidential value. A, a landowner, filed a suit for ejectment against B, a tenant. B alleged he was a permanent tenant at a fixed rent under an agreement with the original owner of the land, who was dead, and put in evidence statements made by the original owner after he had

26 Cal. 51. Cal. 130, 143, 144.

transferred his interest It was held that the statements were inadmissible [1]

When the statements by interested persons are relevant against one another it is not sufficient that the interest be subsequent in point of time, it must have been derived from the person who made the statement sought to be used as an admission.[2] The admissions of a former owner of property after he has ceased to have any interest in it are not evidence against the party in possession.[3]

This clause indicates that there ought to be a privity, *i.e.*, mutual or successive relationship to the same rights of property. Privies are of three kinds.

(1) Privies in blood, as a heir, an ancestor, and co-parceners.

(2) Privies in law, as executor and testator, administrator and a person dying intestate

(3) Privies in estate or interest, as vendor and purchaser, lessor and lessee, mortgagor and mortgagee, donor and donee.

The grounds upon which admissions are evidence against those in privity with the party making them are that they are identified in interest Where it was proved that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant.[4]

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations

A undertakes to collect rents for B

B sues A for not collecting rent due from C to B

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B

COMMENT.

This section forms an exception to the rule that statements made by strangers to a proceeding are not admissible as against

[1] *Shue Yat Aung* v *Da Li*, (1916) 9 L. B. R. 27.

[2] *Nund Pandah* v. *Gyadhur*, (1868) 10 W R 89.

[3] *Khenum Kuree Choudhrain* v. *Gour Chunder Mojoomdar*, (1866) 5 W. R 267.

[4] *Kemble* v. *Farren*, (1829) 3 C. & P 623; Taylor, 11th Edn., s. 743, p 513

the parties. Thus, in an action by the trustee of a bankrupt, the latter's admissions, made before bankruptcy, are admissible to prove the petitioning creditor's debts.[1] Similarly, the admissions of a *cestui que trust* are evidence against a trustee as far as their interests are identical.[2]

The illustration exemplifies that when the liability of a person who is one of the parties to a suit depends upon the liability of a stranger to the suit, then an admission by the stranger in respect of his liability amounts to an admission on the part of that person.

The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness.[3]

Admissions by persons expressly referred to by party to suit

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute or admissions.

Illustration.

The question is whether a horse sold by A to B is sound

A says to B—"Go and ask C, C knows all about it" C's statement is an admission.

COMMENT.

This section forms another exception to the rule that admissions by strangers to a suit are not relevant. Under it the admissions of a third person are also receivable in evidence against, and have frequently been held to be in fact binding upon, the party who has *expressly referred another to him* for information in regard to an uncertain or disputed matter.[4] There must be an express reference for information in order to make the statement of the person referred to admissible. Such admissions come very near to the case of arbitration. In the application of this principle, it matters not whether the question referred be one of law or of fact; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject; and whether the statements of the referee be adduced in evidence in an action on contract, or in an action of tort.[5]

If one party in a case offers to the other party to settle it, and a witness makes a statement on oath as to a certain fact in dispute, and the statement is made, it shall bind the party making the offer.[6]

[1] *Coole* v. *Braham*, (1848) 18 L. J. Ex. 105; Taylor, 11th Edn, s 759, p 522

[2] *Harrison* v. *Vallance*, (1822) 1 Bing. 45.

[3] *Ali Moidin* v. *Kombi*, (1882) 5 Mad. 239

[4] Taylor, 11th Edn, s. 760, p 522.

[5] Taylor, 11th Edn, s 761, p 523.

[6] *Lloyd* v. *Willan*, (1794) 1 Esp 178.

CASES.

A horse having been killed by falling down an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miner's jury were called, and they should say that the shaft was his, he would pay for the horse. A miner's jury was accordingly called, and they found in writing that the shaft was his. It was held that this finding of the jury, coupled with his declaration, was admissible in evidence against him in an action on the case to recover compensation for the less of the horse.[1]

A prisoner was indicted for receiving stolen goods, knowing them to have been stolen. To prove his guilty knowledge, evidence was given that, being asked by the police as to the prices he had given, he said he did not then know, but his wife would make out a list of them, and next day she, in his presence, produced a list, which was received in evidence against him. It was held that it was admissible.[2]

Proof of admissions against persons making them, and by or on their behalf

21. Admissions are relevant and may be proved as against the person who makes them,[1] or his representative in interest[2]; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

[1] *Sybray v. White*, (1836) 1 M. & W. 435.

[2] *Reg. v. Mallory*, (1884) 15 Cox 456.

Illustrations

(*a*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged, but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged

(*b*) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2)

(*c*) A is accused of a crime committed by him at Calcutta He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2)

(*d*) A is accused of receiving stolen goods knowing them to be stolen

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*

COMMENT.

This section lays down, as a general rule, that admissions are relevant and may be proved against the person who makes them or his representative in interest. Admissions are relevant against persons making them, and if duly proved, though not conclusive, are sufficient evidence of the facts admitted.[1] Illustration (*a*) exemplifies this rule. The rule laid down in this section must be taken subject to ss. 24, 25 and 26 of this Act and ss. 164 and 364 of the Criminal Procedure Code.[2]

An oral confession by an accused person not being open to exception under ss. 24, 25 or 26, is, as an admission

[1] *Maung Mya* v. *Ma Tha Ya*, (1897-1901) 2 U. B. R. 377.

[2] *Queen-Empress* v. *Bhairab Chunder*, (1898) 2 C. W. N. 702.

by an accused person, a relevant fact and may be proved at his trial under this section, and therefore such a confession made to a Magistrate is relevant, and may be proved by the evidence of the Magistrate.[1] The accused went to a police station and lodged a first information of murder, narrating the events preceding the commission of the offence and stating further how the offence was committed. It was held that the narrative of the antecedent events was admissible as admissions not amounting to confessions.[2]

1. 'As against the person who makes them.'—This expression means that the admissions are relevant as against the person by or on whose behalf they are made. A person is not concluded by his own statements unless they have been acted upon by the opposite party. Till they are not acted upon it may be shown that they were mistaken or untrue.

2. 'Representative in interest.'—This expression will include those who are privies in blood, law or estate. The purchaser at an ordinary execution sale is in privy with, and is the representative in interest of, the judgment-debtor so as to be bound by the latter's admissions.[3] There is a distinction between the position of a purchaser in a private sale and in a public sale in execution of a decree. In the former he derives his title through, and cannot require a better title than, the vendor: in the latter he acquires his title by operation of law adversely to the judgment-debtor and so freed from all alienations and incumbrances effected by the debtor subsequently to the attachment of the property sold in execution.[4] But the purchaser in a public or a private sale acquires only the right, title and interest of the judgment-debtor with all its defects and the creditor takes the property subject to all equities which would affect it in the debtor's hands.

Exceptions.—Admissions cannot be proved by, or on behalf of, the person who makes them, because a person will always naturally make statements that are favourable to him. To this principle three exceptions are laid down in the section:—

Exception 1.—This exception makes admissible the statement made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question [s. 32 (1)]; see illustrations (*b*) and (*c*). The declarations of

[1] *Shere Singh* v. *The Empress*, (1881) P. R. No. 21 of 1881 (Cr); *Feroz* v. *The Crown*, (1917) P. R. No. 11 of 1918 (Cr).

[2] *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, (1921) 49 Cal. 67.

[3] *Ishan Chunder Sircar* v. *Beri Madhub Sirkar*, (1896) 24 Cal. 62; *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy*, (1895) 22 Cal. 909, P. C.

[4] *Dinendronath Sannyal* v. *Ramcoomar Ghose*, (1880) L. R. 8 I. A. 65.

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2 *Legal Remembrancer* v *Lalit Mohan Singh Roy*, (1921) 49 Cal 67.

3 *Ishan Chunder Sircar* v [illegible] *Madhub Sirkar*, (1896) [illegible] 62; *Mahomed Mozuffer Hossein* [illegible] *Mohun Roy*, (1895) 22 Cal. [illegible]

4 *Dinendronath Sanyal* [illegible] P.C. *Ramcoomar Ghose*, (1880) L. R. [illegible] I. A. 65.

the deceased made on the day he was wounded, and when he believed he would not recover, were held admissible, though he did not die until eleven days afterwards, and though the surgeon did not think his case hopeless, and continued to tell him so until the day of his death[1]

Exception 2.—The state of a man's mind or body is relevant under s. 14; and statements narrating such facts indicating the state of mind or body may be proved on behalf of a person narrating them. But such statements should have been made at or about the time when such state of mind or body existed: see illustrations (*d*) and (*e*). Section 14 merely declared that such statements are relevant. This clause shows that such facts or statements may be proved on behalf of the person making them.

Exceptions 3.—This exception lays down that facts which are relevant under ss. 6 to 1[illegible] they may be proved on [illegible] trations (*d*) and (*e*) refer [illegible]

CASE.

Where the plaintiffs and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence, it was held that the documents were admissible against those defendants under ss. 11 (2) and 21 (3).[2]

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

COMMENT.

The contents of a document which is capable of being produced must be proved by the instrument itself and not by parol evidence.

A written contract can only be proved by the production of the writing itself, and if the document is inadmissible from want

[1] *Rex* v. *Robert Mosley*, (1825) 1 Mood. C. C. 97.

[2] *Gyannessa* v. *Mobarakannessa*, (1897) 25 Cal. 210.

of registration, no secondary evidence of the contract can be received. A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself.[1]

The principle laid down in this section is a departure from English law which admits oral admissions of a party as to the contents of a document, even when the document might have been produced as evidence against him.

Admissions in civil cases when relevant

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given,[1] or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.[2]

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

COMMENT.

This section lays down that in civil cases an admission is not relevant (1) when it is made either upon an express condition that evidence of it is not to be given, and (2) when it is made under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

This section does not apply to criminal cases (see s. 29).

1. 'Express condition that evidence of it is not to be given.'—This section protects communications made 'without prejudice.' Confidential overtures of pacification and any other offers between litigants made without prejudice are excluded on grounds of public policy. For, if parties were to be prejudiced by their efforts to compromise it would be impossible to attempt any amicable arrangement of differences.[2] The expression 'without prejudice' means without prejudice to the writer of the letter if the terms he proposes are not accepted. It means this: "I make you an offer which you may accept or not, as you like; but if you do not accept it, my having made it, is to have no effect at all."[3] If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice,

[1] *Shekh Ibrahim* v. *Parvata Hari*, (1871) 8 B H. C. (A. C. J.) 163.

[2] *Hoghton* v. *Hoghton*, (1852) 15 Beav. 278.

[3] *In re River Steamer Company*, (1871) L. R. 6 Ch. 822, 827.

operates to alter the old state of things and to establish a new one.[1]

The reply to a letter written 'without prejudice' cannot be admitted in evidence even though not guarded in a similar manner. The words once used will exclude an entire correspondence.

The rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation [2]

2. 'Under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.'—Such circumstances must be of such a character that the Court must naturally come to the conclusion that the parties agreed together that evidence of it should not be given. In a suit for rent, there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted. It was held that the mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted was not in itself sufficient to prevent the conversation from being put in evidence [3]

Explanation.—Under the explanation the legal adviser of a party will not be prevented from giving evidence of any communication made in furtherance of any illegal purpose or any fact showing that a crime or fraud has been committed since his employment.

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

24. A confession[1] made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise[2] having reference to the charge against the accused person,[3] proceeding from a person in authority[4] and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable[5] for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature[5] in reference to the proceedings against him.

COMMENT.

The substantive law of confession is contained in ss. 24 to 30 of the Evidence Act and the adjective law, in ss. 164, 364 and 533

[1] *Walker* v. *Wilsher*, (1889) 23 Q B D 335.

[2] *Madhavrav* v. *Gulabbhai*, (1898) 23 Bom. 177, 180

[3] *Meajan Matbar* v. *Alimuddi Mia*, (1916) 44 Cal. 130

of the Criminal Procedure Code. Confessions are received in evidence in criminal cases upon the same principle on which admissions are received in civil cases, namely, the presumption that a person will not make an untrue statement against his own interest. A man of sound mind and full age, who makes a statement in ordinary simple language and has not been the victim of malpractice, threat or inducement in making such statement, must be bound by the language of the statement and by its ordinary plain meaning and the act spoken to must be given its legal consequence.[1]

The confession of an accused is only relevant against himself, though s 30 is an exception to this rule.

According to s. 24 a confession by an accused is irrelevant if it is caused by (1) inducement, (2) threat, or (3) promise. The inducement, threat, or promise should have (a) reference to the [illegible]

the proceedings against him.

A confession is relevant—

(1) if it is made after the impression caused by any such inducement, threat or promise has been fully removed (s. 28);

(2) if it is not made to a Police Officer (s. 25); or

(3) if it is made in the presence of a Magistrate when the accused is in custody of a Police Officer (s 26).

Under the English law confessions are divided into two classes: (1) Judicial confessions; and (2) Extra-judicial confessions.

(1) Judicial confessions are those which are made before a Magistrate or in a Court in the course of legal proceedings.

(2) Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or in a Court

1. **'Confession.'**—A confession is an admission made at any time by any person charged with a crime stating or suggesting an inference that he committed that crime.[2]

The word 'confession' cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt.[3] An incriminating statement which falls short of an absolute confession, but from which the inference of guilt follows, is a confession within the meaning of this Act.[4]

A confession, if proved satisfactorily to be voluntary and genuine, is legal and sufficient proof of guilt of the accused without corroboration, but ordinarily the practice is to require some sup-

1 Per Mears, C. J., in *Raggha* v. *Emperor*, (1925) 23 A.L.J R. 821, F.B.

[illegible]

3 *Queen-Empress* v. *Jagrup*, [illegible] 7 All 646, 648.

4 *Queen-Empress* v. *Nana*, [illegible] 14 Bom 260, F. B; *Hakim* [illegible] v. *Emperor*, (1905) P. R [illegible] (Cr) [illegible] All

port for a confession, some corroboration from facts established outside the confession, and reasonable consistency with the surrounding circumstances about which there is no doubt. The confession must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them amounts to an admission of guilt or not.[1] The Court, however, is at liberty to disregard any self-exculpatory statements contained in the confession which is disbelieved.[2] But, if it appears that the confession has been improperly induced, then the Court is bound to exclude it, no matter how true it may be.[3] Deliberate and [illegible] proved, are among the most [illegible] when a doubt arises as to [illegible] Court has to decide whether it has been proved affirmatively to be free and voluntary. This principle, as laid down in *Thompson's case*,[5] has not been approved of by the Bombay High Court in *Queen-Empress* v. *Baswanta*.[6]

The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in this section.[7]

It is not sufficient to render a confession irrelevant under this section that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.[8] It is the duty of the Court to inquire very carefully into all the circumstances under which the confession was taken, and particularly as to the length of time during which the accused was in custody.[9]

A confession differs from an admission.—

(1) The former is a statement made by an accused person which is sought to be proved against him in a criminal proceeding to establish an offence, while under the latter are comprised all other statements amounting to admissions as defined in s. 18.

(2) A confession is a conclusive proof of the matters confessed; an admission is not a conclusive proof of the matters admitted, but may operate as an estoppel.

(3) A confession always goes against the person making it; an admission may be used on behalf of the person making it under the exceptions provided in s. 21.

See comment on s. 17, *supra*.

1 *Queen-Empress* v. *Jagrup*, (1885) 7 All. 646, 648.

2 *Queen-Empress* v. *Uma*, (1888) Unrep. Cr. C. 370; *Queen-Empress* v. *Dada Ana*, (1889) 15 Bom. 452.

3 *Emperor* v. *Bhagi*, (1906) 8 Bom. L. R. 697, 699.

4 *Emperor* v. *Narayen*, (1907) 9 Bom. L. R. 789, 801; 32 Bom. 101, F. B.

5 [1893] 2 Q. B. 12.

6 (1900) 2 Bom. L. R. 761; 25 Bom. 168.

7 *Queen-Empress* v. *Baswanta*, (1900) 2 Bom. L. R. 761; 25 Bom. 168.

8 *Emperor* v. *Narayen*, (1907) 9 Bom. L. R. 789, 801; 32 Bom. 111, F. B.

9 *Queen-Empress* v. *Narayan*, (1901) 3 Bom. L. R. 122.

2. **'Inducement, threat or promise.'**—Either of these need not be expressed, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case.[1]

The threat to come under this section must be sufficient to give the accused grounds for supposing that, by making the confession, he would gain an advantage.[2]

To reject a confession it is not necessary that there should be positive proof to establish that the confession had been obtained by use of threat, persuasion, etc. Anything from a barest suspicion to positive evidence would be enough for a confession being discarded. A confession in its normal state is an entirely suspicious article. A retracted confession is worse.[3]

3. **'Having reference to the charge against the accused.'**—'Charge' means a criminal charge or a charge of an offence in a criminal proceeding. The inducement, threat, or promise, must [illegible]

evidence.

An inducement to confess regarding one crime will not invalidate a confession as to another and different one except where the two offences are so blended together as to form one transaction.[4]

A promise or threat made to one prisoner will not render a confession made by another, who was present and heard the inducement, irrelevant.[5]

4. **'Person in authority.'**—This expression does not mean a person having control over the prosecution of the accused.[6]

The test would seem to be, has the person authority to interfere in the matter; and any concern or interest in it would be sufficient to give him that authority. According to English cases any one engaged in the arrest, detention, examination, or prosecution of the accused, or someone acting in the presence and without the dissent of such a person is a person in authority.[7] The belief of an accused that the persons to whom he made a confession were "persons in authority" is not sufficient to bring them within the term.[8]

An attorney engaged in the investigation of a crime, for the purpose of getting up a prosecution, is a person clothed with authority to offer such an inducement.[9]

1 *Reg.* v. *Gillis*, (1866) 11 Cox 69.

2 *S. N. Mukerjee* v. *Queen-Empress*, (1897-1901) 1 U. B. R. 147.

3 Per Mukerji J. in *Raggha* v. *Emperor*, (1925) 23 A. L. J. R. 821, F.B.

4 *Regina* v. *Ann Hearn*, (1841) Car. & M. 109.

5 *Reg* v. *Jacobs*, (1849) 4 Cox 54.

6 *Reg.* v. *Nairoji Dadabhai*, (1872) 9 B. H. C. 358.

7 *Rex.* v. *Pountney*, (1836) 7 C. & P. 302.

8 *Emperor* v. *Ganesh Chandra Golder*, (1922) 50 Cal. 127.

9 *The Queen* v. *Croydon*, 2 Cox 67.

port for a confession, some corroboration from facts established outside the confession, and reasonable consistency with the surrounding circumstances about which there is no doubt. The confession must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them amounts to an admission of guilt or not.[1] The Court, however, is at liberty to disregard any self-exculpatory statements contained in the confession which is disbelieved.[2] But, if it appears that the confession has been improperly induced, then the Court is bound to exclude it, no matter how true it may be.[3] Deliberate and [illegible] proved, are among the most [illegible] when a doubt arises as to [illegible] ourt has to decide whether [illegible] free and voluntary. This principle, as laid down in *Thompson's case*,[5] has not been approved of by the Bombay High Court in *Queen-Empress* v. *Baswanta*.[6]

The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in this section.[7]

It is not sufficient to render a confession irrelevant under this section that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.[8] It is the duty of the Court to inquire very carefully into all the circumstances under which the confession was taken, and particularly as to the length of time during which the accused was in custody.[9]

A confession differs from an admission.—

(1) The former is a statement made by an accused person which is sought to be proved against him in a criminal proceeding to establish an offence, while under the latter are comprised all other statements amounting to admissions as defined in s. 18.

(2) A confession is a conclusive proof of the matters confessed; an admission is not a conclusive proof of the matters admitted, but may operate as an estoppel.

(3) A confession always goes against the person making it; an admission may be used on behalf of the person making it under the exceptions provided in s. 21.

See comment on s. 17, *supra*.

1 *Queen-Empress* v. *Jagrup*, (1885) 7 All. 646, 648.

2 *Queen-Empress* v. *Uma*, (1888) Unrep. Cr. C. 370; *Queen-Empress* v. *Dada Ana*, (1889) 15 Bom. 452.

3 *Emperor* v. *Bhagi*, (1906) 8 Bom. L. R. 697, 699.

4 *Emperor* v. *Narayen*, (1907) 9 Bom. L. R. 789, 801; 32 Bom. 101, F. B.

5 [1893] 2 Q. B. 12.

6 (1900) 2 Bom. L. R. 761; 25 Bom. 168

7 *Queen-Empress* v. *Baswanta*, (1900) 2 Bom. L. R. 761; 25 Bom. 168.

8 *Emperor* v. *Narayen*, (1907) 9 Bom. L. R. 789, 801; 32 Bom. 111, F. B.

9 *Queen-Empress* v. *Narayan*, (1901) 3 Bom. L. R. 122.

2. **' Inducement, threat or promise,'**—Either of these need not be expressed, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case.[1]

The threat to come under this section must be sufficient to give the accused grounds for supposing that, by making the confession, he would gain an advantage.[2]

To reject a confession it is not necessary that there should be positive proof to establish that the confession had been obtained by use of threat, persuasion, etc. Anything from a barest suspicion to positive evidence would be enough for a confession being discarded. A confession in its normal state is an entirely suspicious article. A retracted confession is worse.[3]

3. **' Having reference to the charge against the accused,'**—' Charge ' means a criminal charge or a charge of an offence in a criminal proceeding. The inducement, threat, or promise, must be with reference to the offence, with which the accused is charged. A confession obtained by an inducement relating to some collateral matter unconnected with the charge will not be excluded from evidence.

An inducement to confess regarding one crime will not invalidate a confession as to another and different one except where the two offences are so blended together as to form one transaction.[4]

A promise or threat made to one prisoner will not render a confession made by another, who was present and heard the inducement, irrelevant.[5]

4. **' Person in authority '**—This expression does not mean a person having control over the prosecution of the accused.[6]

The test would seem to be, has the person authority to interfere in the matter; and any concern or interest in it would be sufficient to give him that authority. According to English cases any one engaged in the arrest, detention, examination, or prosecution of the accused, or someone acting in the presence and without the dissent of such a person is a person in authority.[7] The belief of an accused that the persons to whom he made a confession were " persons in authority " is not sufficient to bring them within the term.[8]

An attorney engaged in the investigation of a crime, for the purpose of getting up a prosecution, is a person clothed with authority to offer such an inducement.[9]

1 *Reg.* v. *Gillis,* (1866) 11 Cox 69

[illegible]

5 *Reg.* v. *Jacobs,* (1840) 4 Cox 54.

6 *Reg.* v. *Navroji Dadabhai,* (1872) 9 B. H. C. 358

7 *Rex.* v. *Pountney,* (1836) 7 C. & P. 302.

8 *Emperor* v. *Ganesh Chandra Golder,* (1922) 50 Cal. 127.

9 *The Queen* v. *Croydon,* (1846) 2 Cox 67.

5. 'Grounds which would appear to him reasonable.'—The word 'appear' imports judicial discretion. It shows that the Court has to decide the preliminary question of admissibility on a consideration of the evidence and the surrounding circumstances[1] "The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in that section It may be that this section does not require positive proof, within the meaning of s 3, of improper inducement to justify the rejection of the confession The use of the word 'appears' indicates, it may be argued, a lesser degree of probability than would be necessary if 'proof' had been required. A Court might perhaps in a particular case fairly hesitate to say that *it was proved that the confession had been unlawfully obtained*, and yet might be in a position to say that such appeared to it to have been the case Still, although....a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest....The mere subsequent retraction of a confession which has been duly recorded *and certified by a Magistrate, is not enough in all cases to make* it appear to have been unlawfully induced."[2] The Court has to determine the sufficiency of the inducement, threat or promise as affording certain grounds, to see whether the grounds would appear reasonable for the supposition mentioned in the section, and to judge whether the confession appears to have been caused in consequence of the inducement, threat or promise. A well-grounded conjecture reasonably based on the circumstances in the evidence is sufficient to exclude the confession. The mentality of the accused rather than that of the person in authority has to be taken into account by the Court in determining the effect of the inducement, threat or promise. It has to consider not merely the actual words, but also the words, coupled with the acts or conduct of such person, which might be construed by the accused, in his position, as amounting to an inducement, threat or promise. A perfectly innocent expression, coupled with the acts and conduct and the surrounding circumstances, may amount to the same.[3]

A retracted confession is inadmissible under this section.[4]

6. 'Temporal nature.'—The inducement must be of a temporal kind. Confessions obtained by spiritual exhortations are admissible in evidence.

Confession by an accused who has been administered an oath.—A confession by an accused person is not rendered irrele-

[1] *Emperor v Narayen*, (1907) 9 Bom. L. R 789, 801, 32 Bom 111, F B

[2] *Queen-Empress v Baswanta*, (1900) 2 Bom L. R 761, 765

[3] *Emperor v Panchkowri Dutt*, (1924) 52 Cal 67

[4] *Nga Thin Nu v. The Queen-Empress*, (1893) P. J L B 7

vant under this section merely because the accused person has been sworn or affirmed [1]

CASES

Inducement.—On the examination of an accused before the Magistrate on a charge of felony, the Magistrate's clerk told the accused not to say anything to prejudice himself, as what he said would be taken down, "used for him or against him at his trial." It was held that this was an inducement held out, and that the statement was, therefore, not receivable in evidence.[2]

On a trial for larceny, evidence was received of a confession made by the prisoner to the prosecutor in the presence of a Police Inspector, immediately after the prosecutor had said to the prisoner, "The Inspector tells me you are making house-breaking implements, if that is so, you had better tell the truth, it may be better for you." It was held that the confession was not admissible in evidence [3]

A confession made by an accused on the faith of a promise made by the police officer making the inquiry that he would get off if he made a disclosure[4] or would get a pardon[5] was held to be inadmissible in evidence. Similarly, a confession made before a Magistrate who had told the accused that, if he made a full confession, he would take that fact into consideration in awarding punishment, was held inadmissible [6] A confession made by an accused person with the explanation added that he was given to understand that he would be made an approver or there was a reasonable prospect of his receiving a pardon is not admissible in evidence [7] But where, after making such a confession, the accused makes a statement under s. 364 of the Code of Criminal Procedure, in which, after stating that he has now no hope of obtaining a pardon, he affirms the confession previously made, such statement may be used, as against the person making it.[8]

No inducement.—The prisoner was called up by his master and told: "You are in the presence of two police officers; and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." The master afterwards added: "Take care; we know more than you think."

1 *Raj Mal* v *The Empress*, (1879) P R No. 3 of 1880 (Cr)

2 *Reg* v *Drew*, (1837) 8 C. & P 140.

3 *Regina* v *Fennell*, (1881) 7 Q B D 147.

4 *Mussammat Nurai* v *The Empress*, (1882) P. R No 8 of 1882 (Cr)

5 *Muhammad Shaffi* v. *Queen-Empress*, (1899) P. R. No 1 of 1899 (Cr.), *Nga Po Kyaw* v. *Queen-Empress*, (1886) S J L B 396; *Emperor* v *Cunna*, (1920) 22 Bom L. R. 1247, in which there was a difference of opinion amongst the judges as to the admissibility of evidence of the accused in virtue of s 339 (2) of the Criminal Procedure Code.

6 *Queen-Empress* v. *Nga Paw Lon*, (1884) S. J. L. B. 289

7 *Emperor* v. *Khetal*, (1923) 45 All. 300

8 *Emperor* v *Tara*, (1923) 45 All 633.

The prisoner thereupon made a statement. It was held that such a statement was admissible against him on his trial for larceny.[1]

The accused, while in the custody of a policeman on a charge of arson, said to her mistress: "If you forgive me I will tell you the truth." The mistress answered: "Ann, did you do it?" The prisoner thereupon made a statement. It was held that the statement thus made was admissible against the accused.[2]

An accused was before a Magistrate, on a charge of felony and, after the examination of the witnesses against him, the Magistrate said to him, "Be sure you say nothing but the truth or it will be taken against you, and may be given in evidence against you at your trial." It was held that this did not exclude the accused's statement from being given in evidence.[3]

A and his wife were separately in custody on a charge of receiving stolen property A person who was in the room with A, said: "I hope you will tell, because Mrs. G can ill-afford to lose the money"; and the constable then said: "If you will tell where the property is, you shall see your wife." It was held that a statement made by A afterwards was admissible in evidence.[4]

A was in custody on a charge of murder B, a fellow-prisoner said to him "I wish you would tell me how you murdered the boy—pray split." A replied · "Will you be upon your oath not to mention what I tell you?" B went upon his oath that he would not tell. A then made a statement It was held that this was not such an inducement to confess as would render the statement inadmissible[5]

The prisoners, two children, one aged eight and the other a little older, were tried for attempting to obstruct a railway train. It was proved that the mothers of the prisoners and a policeman being present, after they had been apprehended, the mother of one of the prisoners said: "You had better, as good boys, tell the truth", whereupon both the prisoners confessed. It was held that this confession was admissible in evidence against the prisoners.[6]

A prisoner charged with felony being in custody handcuffed in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said: "If the hand-cuffs are taken off I will tell you where I put the property." It was held that this statement was receivable in evidence, and could not be objected to, either as a confession made under a promise or a statement obtained by duress.[7]

1 *The Queen* v. *Jarvis*, (1867) L R. 1 C. C R 96.

2 *Reg* v. *Mansfield*, (1881) 14 Cox 639.

3 *Regina* v. *Holmes*, (1843) 1 C. & K. 248.

4 *Rex* v. *William Lloyd*, (1834) 6 C. & P. 393.

5 *Rex* v. *Shaw*, (1834) 6 C. & P. 372.

6 *The Queen* v. *Reeve*, (1872) L. R. 1 C. C. R. 362

7 *Rex* v. *Green*, (1834) 6 C. & P. 655.

Where a police officer read over to the accused the statements which he had taken from others and then told him, "I know the whole thing now," and the accused thereupon made a statement in consequence of which he was arrested and his confession was duly recorded, it was held that the confession recorded under those circumstances was free and voluntary and was perfectly admissible in evidence.[1]

Person in authority.—Auditor.—W, a travelling auditor in the service of the G. I. P. Railway Company, having discovered defalcations in the account of the prisoner, who was a booking-clerk of the Company, went to him and told him that, "he had better pay the money than go to jail," and added that "it would be better for him to tell the truth," after which the prisoner was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of Rs. 826-8-0. The prisoner was subsequently put on his trial for criminal breach of trust as a servant in respect of his and other sums. It was held that the words used by W, the travelling auditor, constituted an inducement to the prisoner to confess, and that W was a person in authority, and that the receipt signed by the prisoner was, therefore, not admissible in evidence on his trial.[2]

Panchayat.—The matter before a *panchayat* was whether M and K had murdered B, and thereby disqualified themselves from further intercourse with the rest of their brotherhood. M and K made certain statements before the *panchayat*, which it was afterwards sought to prove against them on their trial for the murder of B as confessions corroborating the evidence of an approver. The witnesses called to prove these "confessions" did not state specifically what was said by M and K before the *panchayat*. One witness, a member of the *panchayat*, said: "M confessed and K acquiesced." Another witness, also a member of the *panchayat*, said: "M and K were taxed with taking B's house, upon which both admitted having murdered him." The same witness also said: "The admissions were not taken down." It appeared that it was not till at the sixth meeting of the *panchayat*, and when M and K were threatened with excommunication from caste for life, that they made such statements. It was held that, if the statements attributed to M and K had been actually made, and assented to, and this fact had been duly proved, the provisions of this section could not be pleaded against their admissibility on the ground that such statements had been caused by such threat, for the members of the *panchayat* were not in authority over M and K within the meaning of that section, nor was there any threat made having reference to any charge against them. The statements, however, could not be accepted as suffi-

[1] *King-Emperor* v. *Rango*, (1901) 3 Bom. L. R. 404.

[2] *Reg.* v. *Navroji Dadabhai*, (1872). 9 B. H. C. 358; *Emperor* v. *Dinanath*, (1920) 23 Bom. L. R. 338; *Nga Pye* v. *King-Emperor*, ( ) 2 L. B. R. 316.

Spiritual exhortation.—An accused charged with murder, being a few days short of fourteen, was told by a man who was present when he was taken up, but not a constable, "Now kneel you down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty." The accused in consequence made certain statements. It was held that the statements were admissible in evidence.[1]

Confession to police-officer not to be proved

25. No confession[1] made to a police-officer[2] shall be proved as against[3] a person accused of any offence.

COMMENT.

Under this section, a confession made to a police-officer is inadmissible in evidence except so far as is provided by s. 27.

The object of this section and s. 26 is to prevent the practice of torture by the police for the purpose of extracting confessions from accused persons. Under this section no confession made to a police officer is admissible against the accused. Any incriminating statement made by an accused to a police-officer is inadmissible in evidence[2] The broad ground for not admitting confessions made to a police-officer is to avoid the danger of admitting false confessions.[3] Under the next section a confession made to a private person by a person in custody of the police is inadmissible in evidence.

Section 26 does not qualify the plain meaning of this section.[4]

Section 27 serves as a proviso to this section.

Section 162 of the Criminal Procedure Code enacts that no statement made by any person to a police-officer in the course of an investigation shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence.

1. 'Confession.'—The Madras High Court has held that a statement of a confessional nature made by a witness to a police officer is a confession of an accused person within the purview of this section. The section renders the statements of approvers to police officers inadmissible. An admission of guilt made to a police-officer by *any person* cannot be proved as against *any person accused* of any offence whether he be the person who made the admission or not.[5]

1 *Rex v. William Wild*, (1835) 1 Moody C. C. 452.

2 *Imperatrix v. Pandharinath*, (1881) 6 Bom. 34; *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F. B.; *Queen-Empress v. Mathews*, (1884) 10 Cal. 1022; *Queen Empress v. Javecharam*, (1894) 19 Bom. 363; *Farid v. King-Emperor*, (1906) P. R. No 16 of 1906 (Cr.); *Queen-Empress v. Nga Thet*, (1897-1901) 1 U. B. R. 156.

3 *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, 532, F. B.

4 *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207.

5 *Muthukumaraswami Pillai v. King-Emperor*, (1912) 35 Mad. 397, F. B; contra *King-Emperor v. Nilakanta*, (1912) 35 Mad. 247.

This section does not exclude all statements by an accused to the police but only confessions. There is a distinction between mere admissions and confessions which are statements either directly admitting guilt or suggesting the inference of guilt of the crime charged. The general rule in the section is further subject to that which admits statements leading to discovery whether they amount to confessions or not. Exculpatory statements by an accused to the police as to what, according to his case, actually happened on the occasion of the commission of the offence are put forward by way of defence, are admissible as admissions, notwithstanding that they are shown by other evidence to be untruthful. A useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution If the prosecution relies on the statements as true they may, and probably in many cases will be found to amount to confessions. If they are relied on not because of their truth but of their falsity and as a circumstance thereby tending to prove the guilt of the accused, they are admissible as admissions. Where the accused told the police that certain other persons had killed the deceased, described the occurrence, and stated that he was seized by them but escaped and concealed himself in a paddy field, that he went to the houses of several people for assistance against the murderers but was turned away as a mad man, and that he then went and slept at the house of another person, it was held that the statements were admissible in evidence.[1]

2. 'Police Officer.'—This term should not be read in a strict technical sense but according to its more comprehensive and popular meaning.[2] It applies to every police officer and is not to be restricted to officers in a regular police force. Thus a Chowkidar,[3] a Police Patel,[4] and a village headman under the Burma Police Act[5] are police officers; but a jailor,[6] an excise officer[7] and an Assistant Commissioner not acting as a Magistrate but merely as an executive officer,[8] are not.

A statement made by an accused to the police, which does not amount directly or indirectly to an admission of any criminating circumstances, is admissible in evidence: hence, where the accused was found carrying away a box at night, and when

1 *Emperor* v. *Kangal Mali*, (1905) 41 Cal 601

2 *Queen* v. *Hurribole Chunder Ghose*, (1876) 1 Cal 207, 215, *Maung Wun* v. *Queen-Empress*, (1893) P J. L. B 22.

3 *Queen-Empress* v *Salemuddin Sheik*, (1899) 26 Cal 569, *The Empress* v. *Indra Chunder Pal*, (1898) 2 C W N. 637. In the Punjab a village chaukidar is held to be not a 'police officer'. *Khuda Bakhsh* v. *The Crown*, (1917) P R. No 42 of 1917 (Cr.).

4 *Empress* v. *Rama Birapa*, (1878) 3 Bom. 12

5 *Lu Bein* v *Queen-Empress*, (1889) S J. L. B 479, *Po Sin* v. *King-Emperor*, (1907) 3 L B. R. 283.

6 *Queen-Empress* v. *Bhima*, (1892) 17 Bom. 485.

7 *Ah Foong* v. *Emperor*, (1918) Cal. 411

8 *Baidullah* v. *Queen-E* (1893) P R. No 10 of 1895

asked by a policeman on duty about the ownership of the box, he stated that the box belonged to him, this statement was held admissible against him, in a trial of theft regarding the box.[1]

An admission made to a police-officer before arrest is admissible in evidence.[2]

3. **'As against.'**—This section does not preclude one accused person from proving a confession made to a police-officer by another accused person tried jointly with him. Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.[3] Statements made by accused persons as to the ownership of property which was the subject-matter of the proceedings against them were admissible as evidence with regard to the ownership of the property in an inquiry held under s. 523 of Act XI of 1882. The Court observed that a confession might be inadmissible under this section, yet for other purposes it would be admissible as an admission under s. 18 against the person who made it in his character of one setting up an interest in property, the object of litigation or judical enquiry and disposal.[4]

CASES.

P, accused of the murder of a girl, gave to a police officer a knife, saying it was the weapon with which he had committed the murder. He also said that he had thrown down the girl's anklets at the scene of the murder and would point them out On the following day he accompanied the police officer to the place where the girl's body had been found, and pointed out the anklets. It was held that such statements, being confessions made to a police officer, whereby no fact was discovered, could not be proved against P.[5]

The prisoner, on his arrest, made a statement in the nature of a confession, which was reduced into writing by one of the Inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police Office, the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. At the trial of the prisoner this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner that, under this section it was inadmissible. On a case certified by the Advocate-General under cl. 26 of the Letters Patent, it was held that the confession was not admissible in evidence.[6]

1 *Emperor* v. *Mahomed*, (1903) 5 Bom. L. R. 312

2 *Empress* v. *Dabee Pershad*, (1881) 6 Cal. 530.

3 *Imperatrix* v *Pitamber Jina*, (1877) 2 Bom. 61.

4 *Queen-Empress* v. *Tribhovan*, (1884) 9 Bom 131.

5 *Empress of India* v. *Pancham*, (1882) 4 All. 198; *Hira Gobar*, (1919) 21 Bom L. R. 724.

6 *Queen* v. *Hurribole Chunder Ghose*, (1876) 1 Cal. 207.

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section as it amounted to an admission of an incriminating circumstance.[1]

Where an accused person makes a confession of his guilt before a police officer and subsequently repeats before a Magistrate the facts and contents of his earlier confession without vouching for its truth, the statement before the Magistrate is inadmissible in evidence.[2]

Confession by accused while in custody of police not to be proved against him.

26. No confession made by any person whilst he is in the custody[1] of a police-officer,[2] unless it be made in the immediate presence of a Magistrate,[3] shall be proved as against such person.

Explanation.—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882

COMMENT.

Section 25 excludes confession to a police officer under any circumstances. Under this section no confession made by a prisoner in custody to *any person* other than a policy officer, shall be admissible, unless made in the immediate presence of a Magistrate. This section excludes confessions to anyone else, while the person making it is in a position to be influenced by a police officer. The presence of the Magistrate secures the free and voluntary nature of the confession and the confessing person has an opportunity of making a statement uncontrolled by any fear of the police.[3] Thus, this section is a further extension of the principle laid down in s 25. Section 25 applies to all confessions to police officers, this section, to confessions to persons other than police officers but made while in police custody. A confession to a police officer will be inadmissible in evidence under s. 25 even if it is made in the presence of a Magistrate.

1 *Emp.* v *Haji Sher Mamomed,* (1921) 46 Bom 961; 25 Bom L R 214.

2 *Anandrao Gangaram Phanse,* (1925) 27 Bom L. R 1034; 80 Bom Cr C 78.

3 *Hiran Miya,* (1877) 1 C. L. R. 21.

A statement made to a police officer by an accused person, while in the custody of the police, although intended to be made in self-exculpation and not as a confession, may be nevertheless an admission of a criminating circumstance, and, if so, under ss. 25 and 26, it cannot be proved against the accused.[1] If it is an admission of a criminating circumstance it cannot be used in evidence either under s 25 or 26.[2]

1. ' Custody. '—The mere temporary absence of a policeman from the room in which the confession was recorded does not terminate his custody of the accused, if he has taken effective steps to prevent his escape whether by locking the door of the room or by waiting outside.[3]

As soon as an accused or suspected person comes into the hands of a police-officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of this section and s. 27.[4]

2. 'Police officer.'—The term includes the police officers of Native States.[5]

3. '[illegible]' [illegible] word ' Magistrate ' [illegible]

If [illegible] person while in the custody of the police, then the presence of a Magistrate is essential. But a confession made to a Magistrate while in the custody of the police, is admissible. A confession made while in the custody of the police to an officer who is not a Magistrate is not admissible in evidence.[7]

CASES.

Custody.—A person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to Godhra. A friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the prisoner had said, on the ground that she was not then

1 *Imperatrix* v. *Pandharinath*, (1881) 6 Bom 34.

2 *Queen-Empress* v. *Javecharam*, (1894) 19 Bom. 363; *Queen-Empress* v. *Jai Singh*, (1900) P. R. No 12 of 1900 (Cr). *Hakiman* v. *King-Emperor* (1905) P. R. No 20 of 1905 (Cr); *Farid* v. *King-Emperor*, (1906) P. R. No. 16 of 1906 (Cr.).

3 *Queen-Empress* v. *Lakshmya*, (1896) Unrep. Cr. C. 855

4 *Maung Lay* v. *King-Emperor* (1923) 1 Rang. 609.

5 *Queen-Empress* v *Nagla Kala*, (1896) 22 Bom. 235, 237.

6 *Ibid*; *Queen-Empress* v. *Sundar Singh*, (1890) 12 All. 595; *Govinda* v. *King-Emperor*, (1920) 17 N. L. R. 113.

7 *Emperor* v. *Mhabli Rama Sail*, (1924) 26 Bom. L. R. 706.

in custody, and that this section did not apply. It was held that notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question must be disallowed.[1]

While the accused was in the lock-up of the Magistrate under trial, he was sent up by the Magistrate to a hospital for treatment. He was taken from the lock-up to the dispensary by two policemen, who waited outside on the verandah of the hospital. During his examination inside the dispensary by the doctor the accused made a confession of his guilt to another patient who happened to be there within the hearing of the doctor. It was held that the confession was excluded by this section, because the accused who was in police custody up to his arrival at the hospital, remained in that custody even though the policemen were standing outside on the verandah.[2]

The custody of keeper of a jail in a Native State, who is not a police officer, does not become that of a police officer, merely because his subordinates, the warders of the jail, are members of the police force of that State. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a police officer investigating an offence, this section does not exclude such a jailor from giving evidence of what the accused told him while in jail.[3]

How much of information received from accused may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information[1] received from a person accused of any offence, in the custody of a police-officer,[2] so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

COMMENT.

This section comes into operation only if and when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody. In such a case so much of the information as relates distinctly to the fact or facts thereby discovered is admissible.[4]

This section serves as a proviso to ss. 25 and 26. It serves as a proviso to s. 25 when the accused is in the *custody* of the police. It is founded on the principle that if the confession is supported by

[1] *Empress* v *Lester*, (1895) 20 Bom. 165

[2] *Emperor* v *Mallangowda Parwatgowda* (1917) 19 Bom L. R. 683.

[3] *Queen-Empress* v. *Taiya*, (189 20 Bom. 795; *Nadir* v. *Crown*, (1914) P R. No. 8 of 1914 (Cr.).

[4] *Legal Remembrancer* v. *Lalit Mohan Singh* (1921) 49 Cal. 107.

the discovery of a fact it may be presumed to be true and not to have been extracted.[1] If the statement of an accused person in the custody of police is a necessary preliminary of the fact thereby discovered, it is admissible under this section, it is immaterial whether the statement is sufficient to enable the police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact [2]

This section is not a proviso to s. 24; but the evidence of the fact that the accused pointed out certain property is admissible. No part of a confession caused in the manner described in s. 24 can be relevant except in the circumstances provided for by s. 28. Statements that are irrelevant under one section may be relevant under other sections The word ' irrelevant ' is advisedly retained in s. 24 and is contrasted with " shall not be proved " in the two subsequent sections.[3] The discovery of a fact in consequence of information given by an accused person to the police does not render a subsequent confession to a police officer admissible in evidence [4] The Calcutta High Court has, however, held that this section qualifies s. 24 [5]

1. ' Deposed to as discovered in consequence of information.'— This section was not intended to let in a confession generally, but only such particular part of it as set the person, to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence.[6] Facts said to have been discovered in consequence of information received from a person accused of an offence must be of a kind which such information really helps to bring to light and which it would be difficult to find out otherwise before they can be treated as of any substantial probative value.[7] It is essential that the fact discovered must be deposed to by the person to whom the statement was made.

The test of an admissibility under this section of information received from an accused person in the custody of a police-officer, whether amounting to a confession or not, is:—" Was the fact discovered by the reason of the information, and how much of the

1 [illegible]

2 [illegible] *Nashya*, (1897) 25 Cal 413.

3 *King-Emperor* v. *Nga Po Min*, (1903) 2 L B R. 168; *Nga San Ya* v. *King-Emperor*, (1907-1909) 1 U. B R. (Evi) 3

4 *Kha Hlaw* v. *King-Emperor*, (1907) 4 L. B R. 116

5 *Amiruddin* v. *Emperor*, (1917) 45 Cal 557.

6 [illegible] 4 [illegible] R. 244; *Nga San Bwin* v. *Queen-Empress*, (1892-96) 1 U. B R. 83.

7 *Nga Shwe Tat* v *Queen-Empress*, (1897-1901) 1 U B. R 152.

information was the immediate cause of the fact discovered, and as such a relevant fact?"[1]

It is not all statements connected with the production or finding of property which are admissible, those only which lead immediately to the discovery of property, and so far as they do lead to such discovery are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible Other statements connected with the one thus made evidence, and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police For instance, a man says, "you will find a stick at such and such a place I killed Rama with it." A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick, but any statement as to the confession of murder would be inadmissible. If, instead of "you will find," the prisoner has said, "I placed a sword or knife in such a spot," where it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible.[2] When the statement to the police was, "I will point out the spot where I committed the murder," the part of it relating to the alleged confession by accused that he committed the murder was not receivable in evidence[3]

Statements by an accused to police officers pointing out the places where the offence was committed by others or where he concealed himself thereafter, and the houses to which he went for assistance, whether regarded as information leading to discovery, or as statements made by him as part of his defence, are admissible in evidence as admissions.[4] This section comes into operation only if and when certain facts are deposed to as discovered in consequence of information received from an accused person in

[1] *Queen-Empress* v *Commer Sahib*, (1888) 12 Mad 153 See *Khana* v *Queen-Empress*, (1893) P R. No. 34 of 1894 (Cr), *Maung Tha Ya* v. *Queen-Empress*, (1897) P J L B 363

[2] *Reg* v. *Jora Hasji*, (1874) 11 B H C. 242, 244, 245

[3] *Tara Singh* v. *Crown*, (1915) P. R. No 11 of 1915 (Cr).

[4] *Emperor* v *Kangal Mali*, (1904 41 Cal. 601.

police custody. A police-officer can depose that the accused went to him and
the sword
but the st
admissible.[1]

Where the police succeed in discovering property in conse-

other accused.[2]

The section refers to information whether received by a police officer or by other persons, there being nothing in the language of the section to justify any distinction in respect of the person to whom the information is to be given.[3]

A statement is equally admissible whether the statement is made in such detail as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed.[4]

2. **'In the custody of a police-officer.'**—The section does

of the Criminal Procedure Code is 'custody' within the meaning of this section.[6]

CASES.

The accused was charged, under s. 411 of the Penal Code, with dishonestly receiving stolen property. In the course of the police investigation the accused was asked by the police where the property was. He replied that he had kept it, and would show it. He said he had buried the property in the fields. He then took the police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was contended that those statements were inadmissible, having been made when the accused was in custody of the police. It was held (1) that the above statements were clearly in the nature of a confession, as they suggested the inference that the prisoner committed the crime, and even if not intended by the accused as a confession

[1] *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, (1921) 49 Cal. 167.
[2] *Queen-Empress* v. *Bashya*, (1900) 2 Bom. L. R. 1089.
[3] *Queen-Empress* v. *Babu Lal*, (1884) 6 All 509, 511, F. B.
[4] *Queen-Empress* v. *Nana*, (1889) 14 Bom. 260, F. B. See *Gangu* v. *The Empress*, (1885) P. R. 30 of 1885 (Cr.).
[5] *Kha Hlaw* v. *King-Emperor*, (1907) 4 L. B. R. 116; *King-Emperor* v. *Nga Aung Ba*, (1916) 2 U. B. R. 114.
[6] *Legal Remembrancer* v. *Lalit Mohan Singh Roy*, (1921) 49 Cal. 167.

of guilt, they [illegible]
would form a [illegible]
cused, as shov [illegible]
and, therefore, properly within the rule of exclusion in regard to confessions made by a person in the custody of the police; (2) that neither of the above statements was admissible in evidence under explanation 1 of s. 8 as evidence of the conduct of the accused. Section 8, so far as it admits a statement as included in the word "conduct," must be read in connection with ss. 25 and 26, and cannot admit a statement as evidence which would be shut out by those sections; (3) that the accused's statement, that he had buried the property in the fields, was admissible in evidence under s. 27, as it set the police in motion and led to the discovery of the property.[1]

B and R, accused of offences under s 414 of the Penal Code, gave information to the police which led to the discovey of stolen property. This information was to the effect that the accused had stolen a cow and a calf and sold them to a particular person at a particular place. It was held that the information was admissible in evidence [2]

The accused were charged with theft of some *jwari*. During the police investigation they admitted before the police that they had taken the grain and concealed it in a jar, which they forthwith produced. The identity of the *jwari* recovered with that stolen was not proved to the satisfaction of the trying Magistrate except by those admissions, and upon those admissions they were convicted of theft. It was held that, as the prisoners themselves produced the *jwari*, it was by their own act, and not from any information given by them, that the discovery took place and this section, therefore, did not apply, and though the fact of the production of the property might be proved, the accompanying confession made to the police was inadmissible in evidence [3]

M was charged with the murder of a girl In the hope of pardon being given to her, she took the police to a certain place and pointed out and produced certain ornaments which the deceased was wearing at the time of her death. It was held that evidence was admissible to show that the accused did go to a certain place and there produce certain ornaments. Such evidence was admissible under s. 8 irrespective of whether the conduct of the accused was or was not the result of inducement offered by the police.[4]

Information given by one out of two accused.—Where in a criminal case it was alleged that two of the prisoners gave certain information to the police which led immediately to the arrest of one of the accused, it was held that it was only the information

1 *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F B. *Ganu v Queen-Empress*, (1894) P R. No 28 of 1894 (Cr)

2 *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207, 215.

3 *Queen-Empress v. Kamalia*, (1886) 10 Bom. 595.

4 *Emperor v Misri*, (1909) 31 All. 592, F. B.

first given which could be admitted under this section and that it was necessary where two prisoners were said to have given information that what each prisoner said should be precisely and separately stated.[1] A and B were tried together by a Magistrate. Both the accused admitted the offence to persons who assisted the police in the investigation. A accompanied the police and others to his house where certain of the stolen property was discovered. B was not taken to the house until after the discovery. It was held that as the admission of the accused B when in police custody could not be proved against him under s. 26 and the admission of A was inadmissible against B, under this section, the sentence against B was unsustainable.[2]

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

COMMENT.

The proper place of this section would have been after s. 24 as it forms an exception to the provisions of that section. A confession is admissible after the impression caused by any inducement, threat, or promise, has been fully removed because it becomes free and voluntary. The impression caused by inducement, promise, or threat, should have been fully removed before the confession is admissible b [illegible] rson holding an authorit [illegible] the inducement, or by [illegible], ther an inducement has ceased to operate, the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, will be taken into consideration by the Court.

No part of a confession caused in the manner described in s. 24 can be relevant except in the circumstances provided for by this section.[3]

CASE

An accused made a confession to a *panchayat*, before arrest, on January 1, 1922, and he was thereupon kept in custody by the villagers till the arrival, next day, of the police, who formally arrested him, and sent him before a Magistrate, and the latter recorded his confession on the 4th instant. It was held that the improper influence employed by the *panchayat* continued to the time of the recording of the confession by the Magistrate, and that such confession was inadmissible.[4]

1 *Ram Singh* v. *The Crown*, (1915) P. R. No 7 of 1916 (Cr.).

2 *Queen-Empress* v. *Jai Singh*, (1900) P. R. No. 12 of 1900 (Cr).

3 *King-Emperor* v. *Nga Po Min*, (1903) 2 L. B. R. 168

4 *Emperor* v. *Ganesh Chandra Goldar*, (1922) 50 Cal. 127

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

COMMENT.

A confession which is relevant does not become irrelevant because it was made—

(1) under a promise of secrecy;

(2) in consequence of a deception practised on the accused,

(3) when the accused was drunk;

(4) in answer to questions which the accused need not have answered; and

(5) in consequence of the accused not receiving a warning that he was not bound to make it and that it might be used against him

A confession, which might be inadmissible for the purpose of proving against an accused person to establish an offence, would, yet, for other purposes, be admissible, as an admission under s. 18 against the person who made it.

Statements made by a person in his sleep are not receivable in evidence But a statement made by an accused when he is drunk is receivable in evidence If a police officer gives an accused liquor in the hope of his saying something, and he makes any statement, that statement is not rendered inadmissible in evidence.[1]

that

alities to be undergone by Magistrates in recording confessions.

The mere fact that a statement is elicited by a question does not make it irrelevant as a confession though such fact may be material on the question of voluntariness.[3]

CASES.

The accused made their confession of guilt to the Commissioned Officer of their regiment, who stated to the accused that he had

[1] *Rex v. Spilsbury*, (1835) 7 C. & P. 187.

[2] *Queen-Empress v. Uzeer*, (1884) 10 Cal. 775.

[3] *Barindra Kumar Ghose v. Emperor*, (1909) 37 Cal. 467.

already obtained information from another person and promised secrecy if they told the truth. It was held that the Commissioned Officer was not sh[illegible]
proceedings that [illegible]
deception and in [illegible]
section.[1]

The evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it, is not inadmissible.[2]

Statements made under a promise of secrecy.—A was in custody on a charge of murder. B, a fellow-prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split." A replied. "Will you be upon your oath not to mention what I tell you?" B went upon his oath that he would not tell. A then made a statement. It was held that this was not such an inducement to confess as would render the statement inadmissible.[3] A witness stated that an accused, charged with felony, asked him if he had better confess, and the witness replied that he had better not confess, but that the prisoner might say what he had to say to him, for it should go no further. The prisoner made a statement. It was held that it was receivable in evidence on the trial.[4]

Statement made under deception.—The accused asked the turnkey of the gaol in which he was locked to put a letter into the post for him, and after his promising to do so, the accused gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor. It was held that the letter was admissible in evidence against the accused notwithstanding the manner in which it was obtained.[5]

Consideration of proved confession affecting person making it and others jointly under trial for same offence

30. When more persons than one are being tried jointly[1] for the same offence,[2] and a confession made by one of such persons affecting himself and some other of such persons[3] is proved,[4] the Court may take into consideration such confession[5] as against such other person as well as against the person who makes such confession.

Explanation.—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.

[1] *Emperor* v. *Mahamadbuksh Karimbuksh*, (1906) 8 Bom. L. R. 507.
[2] *Queen* v. *Sageena*, (1867) 7 W. R. (Cr.) 56.
[3] *Rex* v. *Shaw*, (1834) 6 C. & P. 372.
[4] *Rex* v. *David Thomas*, (1836) 7 C. & P. 345.
[5] *Rex* v. *Derrington*, (1826) 2 C. & P. 418.

Illustrations.

(*a*) A and B are jointly tried for the murder of C. It is proved that A said—"B and I murdered C" The Court may consider the effect of this [illegible] as against B.

(*b*) A is on his trial for the murder of C There is evidence to show that [illegible] was murdered by A and B, and that B said—"A and I murdered C."

This statement may not be taken into consideration by the Court against [illegible], as B is not being jointly tried

COMMENT.

The object of this section is that where a prisoner makes a clean [illegible] of it and unreservedly confesses his own guilt, and at the [illegible]ame time implicates another person who is jointly tried with him [illegible]or the same offence, his confession may be taken into consideration [illegible] such other person as well as against himself, because the [illegible] of his own guilt operates as a sort of sanction, which, to [illegible]ome extent, takes the place of an oath, and so affords some guarantee [illegible] the whole statement is a true one.[1] When a person admits [illegible] guilt and exposes himself to the pains and penalties provided [illegible]or, there is a guarantee for his truth.[2] But this is a very [illegible]ak guarantee. For a confession may be true so far as its maker [illegible] concerned, but may be false and concocted through malice so far [illegible]s it affects others.

This section is an exception to the rule that the confession of [illegible]ne person is entirely inadmissible against any other. Where more [illegible] than one are jointly tried for the same offence, the confes[illegible]on made by one of them, if admissible in evidence at all, should [illegible]e taken into consideration against all the accused, and not against [illegible] person alone who made it.[3] The policy of the law in allowing [illegible]

impression on the Judge's mind, which it was therefore better to [illegible]ontrol within limits than to ignore altogether.[4] A confession [illegible] under ss. 24-27 will be inadmissible also under this [illegible]

Under this section a confession by one person may be taken [illegible] consideration against another—

(1) if both of them are tried jointly;
(2) if they are tried for the same offence; and
(3) if the confession is legally proved.

This section is contrary to the English law on the point.

1 *Queen-Empress* v *Jagrup*, (1885) All. 646

2 *Empress* v. *Daji Narsu*, (1882) Bom 288, 291.

3 *Empress* v. *Rama Birapa*, (1878) 3 Bom. 12.

4 *Banna* v. *The Empress*, (1880) P. R No 29 of 1880 (Cr.); *Empress* v. *Daji Narsu*, (1882) 6 [illegible] 288.

English law.—A prisoner is *not liable to be affected* by the *confessions of his accomplices*; and so strictly has this rule been enforced, that where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, was held to be no evidence of that fact as against the receiver; and the decision, it seems, would be the same if both parties were indicted together, and the principal were to plead guilty.[1]

1. 'Tried jointly.'—There should be a joint trial of the accused. The joint trial should be legal. If from any cause the accused who made the confession cannot be legally tried with the accused against whom the confession is to be used, the Court should not attach any value to the confession.

Where the accused pleads guilty at the trial and is convicted and sentenced, he cannot be said to be jointly tried with his co-[illegible] who pleads not guilty.[2] Similarly if one of the accused [illegible]

tried with his co-accused.[3]

Sometimes evidence is taken in sessions cases even after the the accused pleads 'guilty' and the case is decided upon the whole of the evidence including the accused's plea. The Madras High Court is of opinion that when such a procedure is adopted the trial *does not terminate with the plea of guilty, and therefore a confession* by the person so pleading may be taken into consideration as against any other person who is being jointly tried with him for the same offence.[4] A distinction has been drawn by the Madras High Court between a trial before a Session Court, and one before a Magistrate. In Sessions Court the accused's plea *of guilty is recorded* under s. 271 at the outset [illegible]
and is convicted on [illegible]
other co-accused ag[illegible]
When, therefore, all the accused were jointly tried before a Magistrate, and *some of them confessed the crime and implicated* their co-accused in a statement under s. 347, Criminal Procedure Code, and after the evidence for the prosecution was closed pleaded guilty under s. 255 (1), it was held that their statement was admissible in evidence against the other co-accused.[5]

Where the accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence with *other co-accused* and any statement *in the nature of a confes-*

1 Taylor, 11th Edn., s. 904, p. 615.

2 *Reg.* v. *Kalu Patil*, (1874) 11 B. H. C. 146; *Venkatasami* v. *The Queen*, (1883) 7 Mad. 102; *Queen-Empress* v. *Pirbhu*, (1895) 17 All. 524.

3 *Queen-Empress* v. *Pahuji*, (1894) 19 Bom. 195.

[illegible] *ram* (1899) 22 Mad. 491.

5 *In re Bali Reddi*, (1913) 38 Mad. 302; *Fakhruddin* v. *The Crown*, (1924) 6 Lah. 176.

sion that he may use against them.[1] Where a co-accused pleads guilty, and the Court has accepted the plea and directed his removal from the dock, and the trial proceeds against the remaining prisoner alone, a confession by the former is not admissible against the latter.[2]

2. 'For the Same Offence.'—This expression means an offence coming under the same legal definition, *i e*, under the same section of the law.

When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through [illegible]cts separable from those ascribed to his accomplice, and capable, [illegible] accom- [illegible] Indian [illegible] coins, [illegible] pos- [illegible]ed of them. A confessed that he had got the coins from B and [illegible] passed them to several persons at his request It was held that [illegible] confession of A was relevant against B.[4]

Where the Magistrate used against the accused, who was [illegible]arged with assisting in concealing or disposing of stolen property, [illegible]onfessions made by two other persons who were tried for the theft of the property, it was held that under this section those confessions [illegible]e not admissible against the accused who was not charged with [illegible] same offence[5] House-breaking and theft, and receiving the [illegible]operty stolen at that theft, are distinct offences under this section [illegible]nd the confession of one co-accused cannot be taken into considera[illegible]n as against the other[6]

3. 'Confession made by one of such persons affecting himself and other of such persons.'—The confession must implicate the [illegible]ing person substantially to the same extent at it implicates [illegible] person against whom it is to be used, in the commission of the [illegible]ffence for which the prisoners are being jointly tried[7] Statement [illegible] by a prisoner which implicate his fellows, and exculpate him[illegible]lf are not regarded as evidence[8] Thus the test is that the [illegible]essing prisoner must tar himself and the person or persons he [illegible]plicates with one and the same brush.[9] The confession must affect both the person confessing and the other accused. 'Confession' does not include a mere inculpatory admission which falls

1 *Emperor* v *Kheoraj* (1908) 30 All 140

2 *Emperor* v *Keramat Sirdar*, 1911) 38 Cal 446

3 *Queen-Empress* v *Nur Mahomed*, 1883) 8 Bom 223

4 *Ibid.*

5 *Musa* v *The Empress*, (1885) P R. No 31 of 1885 (Cr)

6 *Nga Po Tok* v. *King-Emperor*, 912) 1 U B R (1910-1913) 158

7 *Queen* v *Belat Ali*, (1873) 10 Ben L R 453, *Empress of India* v. *Ganraj*, (1879) 2 All 444; *Aung Hla* v. *Queen-Empress*, (1893) P J L B. 7

8 *The Queen* v. *Keshub Bhoomia*, (1876) 25 W R 8 (Cr.), *Ah Foong* v *Emperor*, (1918) 46 Cal 411.

9 *Empress of India* v. *Ganraj* (1879) 2 All 444, 446; *Gul Hassan* v. *King-Emperor*, (1910) P R. No. 24 of 1910 (Cr)

English law.—A prisoner is not liable to be affected by the *confessions of his accomplices*; and so strictly has this rule been enforced, that where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, was held to be no evidence of that fact as against the receiver; and the decision, it seems, would be the same if both parties were indicted together, and the principal were to plead guilty.[1]

1. 'Tried jointly.'—There should be a joint trial of the accused. The joint trial should be legal If from any cause the accused who made the confession cannot be legally tried with the accused against whom the confession is to be used, the Court should not attach any value to the confession.

Where the accused pleads guilty at the trial and is convicted and sentenced, he cannot be said to be jointly tried with his co-accused who pleads not guilty.[2] Similarly if one of the accused pleads guilty but he is not convicted or sentenced till the conclusion of the trial of his co-accused he cannot be treated as being jointly tried with his co-accused.[3]

Sometimes evidence is taken in sessions cases even after the the accused pleads 'guilty' and the case is decided upon the whole of the evidence including the accused's plea. The Madras High Court is of opinion that when such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration as against any other person who is being jointly tried with him for the same [illegible] Madras High Court [illegible] before a Magistrate. [illegible] ty is recorded under s. 271 at the outset of the trial. A prisoner who then pleads guilty and is convicted on the plea cannot be held to be tried jointly with other co-accused against whom the case proceeds under s. 272. When, therefore, all the accused were jointly tried before a Magistrate, and some of them confessed the crime and implicated their co-accused in a statement under s 347, Criminal Procedure Code, [illegible] pleaded guilty [illegible] dmissible in [illegible] the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence with other co-accused and any statement in the nature of a confes-

1 Taylor, 11th Edn , s. 904, p. 615

2 *Reg* v. *Kalu Patil*, (1874) 11 B. H C. 146; *Venkatasami* v *The Queen*, (1883) 7 Mad 102; *Queen-Empress* v *Pirbhu*, (1895) 17 All 524

3 *Queen-Empress* v *Pahuji*, (1894) 19 Bom 195.

4 *Queen-Empress* v *Chinna Pavuchi*, (1890) 23 Mad. 151, dissenting from *Queen-Empress* v. *Lakshmayya Pandaram* (1899) 22 Mad. 491.

5 *In re Bali Reddi*, (1913) 38 Mad. 302; *Fakhruddin* v *The Crown*, (1924) 6 Lab 176

sion that he may use against them [1] Where a co-accused pleads

latter.[2]

2. 'For the Same Offence.'—This expression means an offence coming under the same legal definition, *i e*, under the same section of the law.

When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be r...

acts sep...
therefore
plice.[3]
Penal C...
knowing
sessed of them A confessed that he had got the coins from B and
request. It was held that
B [4]

...t the accused, who was
...sposing of stolen property,
confessions made by two other persons who were tried for the theft
...is section those confessions
who was not charged with
...l theft, and receiving the
offences under this section
and the confession of one co-accused cannot be taken into consideration as against the other [6]

3. 'Confession made by one of such persons affecting himself and some other of such persons.'—The confession must implicate the confessing person substantially to the same extent as it implicates the person ...
offence for
made by a
self are n...
confessing prisoner must tar himself and the person or persons he implicates with one and t...
affect both the person conf...
ession' does not include a

1 *Emperor* v *Kheoraj* (1908) 30 All 540.
2 *Emperor* v *Keramat Sirdar*, (1911) 38 Cal. 446
3 *Queen-Empress* v *Nur Mahomed*, (1883) 8 Bom 223
4 *Ibid.*
5 *Musa* v *The Empress*, (1885) P R. No 31 of 1885 (Cr).
6 *Nga Po Tok* v. *King-Emperor*, (1912) 1 U B R (1910-1913) 158

7 *Queen* v *Belat Ali*, (1873) 10 Ben L R 453. *Empress of India* v. ...
(1879) 2 All 444, 446; *Gul H...*
King-Emperor, (1910) P. ...
of 1910 (Cr).

short of being an admission of guilt. The terms of the section do not countenance the construction of the statement into a confession by a process of inferential reasoning. It is one thing to make statements giving rise to an inference of guilt and another thing to confess a crime.[1] There must be a distinct confession of the offence charged.[2] [illegible] on of facts [illegible] s- sions of [illegible] ss those facts and the necessary inferences from them amount to an offence.[3] The statement of an accused, made after arrest, and not amounting to a confession, is not admissible in evidence against a co-accused but only against himself.[4]

A confession made by a person against whom an inquiry is being made under s. 476 of the Criminal Procedure Code is a confession within the meaning of this section.[5]

4. **'Proved.'**—The accused who is to be affected by the confession of a co-accused has a right to demand that the confession should be strictly proved and shown to have been taken and recorded as prescribed by the Code of Criminal Procedure. Where a confession is duly proved afterwards, it does not matter whether or not the other accused persons were present when it was made.[6]

5. **'The Court may take into consideration such confession.'**—This section allows a confession made by one of several persons to be taken into consideration as *against* such other person as well as *against* the person making it. It does not permit the confession to be used in *favour* of some other of the co-accused.[7] There is [illegible]

reverence of law, that a conviction founded solely on the confession of a co-accused cannot be sustained. The term 'confession' is not restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. The confession of one co-accused cannot be said to be corroborated by the confession of the other co-accused. Obvious considerations of justice require that a Court, before acting upon such statements, should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to identity. A Judge sitting with assessors ought never to convict an accused solely on the confession of a co-accused since he has no materials before him

[1] *Emperor* v. *Santya Bandu*, (1909) 11 Bom. L. R. 633.

[2] *Empress* v. *Daji Narsu*, (1882) 6 Bom. 288.

[3] *Nga Aung Thein* v. *The Crown*, (1901) 1 L. B. R. 133.

[4] *Sital Singh* v. *Emperor*, (1918) 46 Cal. 700; *Emperor* v. *Abani Bhushan Chuckerbutty*, (1910) 38 Cal. 169; *Muhammad Yunus* v. *Emperor*, (1922) 50 Cal. 318.

[5] *Emperor* v. *Annaji*, (1924) 26 Bom. L. R. 614.

[6] *In the matter of the Petition of Chandra Nath Sirkar*, (1881) 7 Cal. 65.

[7] *Bagga Singh* v. *The Empress*, (1888) P. R. No. 39 of 1888 (Cr.).

to enable him to decide whether as against the accused it is true or false. If he is sitting with a Jury he has a discretion either to withdraw the confession from the Jury or to put it before them with the direction that they ought to acquit unless it is corroborated in material particulars by independent evidence.[1] There must be corroboration not only as to the crime, but also as to the identity of each one of the accused This is no technical rule but one founded on long judicial experience. The Court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction on the confession of a co-accused alone would be bad in law.[2]

The confession referred to in the section is not to have the force of sworn evidence.[3] It may be taken into consideration for the purpose of arriving at a conclusion of fact and may be used for the basis of a reasonable inference

Confessions of a co-accused can be " taken into consideration " against the other accused, but they are not technically evidence within the definition given in s. 3 of the Act; and they cannot, therefore, alone form the basis of a conviction.[4] It is at best the evidence of an accomplice, and illustration (*b*) to s. 114 says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Such evidence must be dealt with by the Court in the same manner as any other evidence. The weight, however, to be attached to such evidence and the question, whether, taken by itself, it is sufficient in point of law to justify a conviction, is a question for the Judge. Unsupported by other evidence, it, however, should be taken as evidence of the weakest possible kind, being simply a statement of a third person not made upon oath or affirmation. If such confession is corroborated by other evidence, it is immaterial whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes [illegible]

themselves support a conviction.[6]

The confession of a co-accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law. This section provides that such a confession is to be an element in the consideration of all the facts of the case, but it does not do away with the necessity for other evidence.

1 *Emperor* v. *Gangapa*, (1913) 15 Bom. L. R. 975.

2 *Emperor* v. *Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559.

3 *Queen-Empress* v. *Nirmal Das*, (1900) 22 All. 445. See *Banna* v. *The Empress*, (1880) P. R. No. 29 of 1880 (Cr.).

4 *Queen-Empress* v. *Khandia bin Pandu*, (1890) 15 Bom. 66, 67; *Venkatasami* v. *The Queen*, (1883) 7 Mad. 102; *Nga Po Mya* v. *Queen-Empress*, (1886) S. J. L. B. 388.

5 Per Garth, C. J., in *Empress* v. *Ashootosh Chuckerbutty*, (1878) 4 Cal. 483, 490, 491, F. B.; *Emperor* v. *S... Khan*, (1919) 21 Bom. L. R. 448.

6 Per Jackson, J., in *Empress* v. *Ashootosh Chuckerbutty*, (1878) 4 Cal. 483, 491, F. B.

It is the duty of the Judge, when there is no other evidence than the confession of a co-accused, to direct the Jury accordingly and tell them to acquit the accused; and his omission to do so is a misdirection which will vitiate a conviction.[1]

The difference between the confession of a co-accused and the evidence of an accomplice is obvious. The evidence of an accomplice is given on oath, whereas the statement of a co-accused is not made on oath The evidence of an accomplice is capable of being tested by cross-examination, while the confession of a co-accused cannot be so tested A conviction can be based on the uncorroborated testimony of an accomplice, though as a matter of practice the Court requires corroboration in material particulars; but it cannot be so based on the statement of a co-accused. The evidence of a co-accused cannot be treated on the same footing as the evidence of an accomplice[2]

Explanation.—This explanation comes into play where the accused making the confession is charged with an offence and his co-accused with an attempt to commit, or abetment of, the same offence.

Retracted confession.—The Bombay High Court has laid down that a retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case, and there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law.[3]

The Allahabad High Court has held that it does not necessarily follow that, because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, therefore the confession is to be rejected. The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, as far as the person making it is concerned, upon such belief.[4] It is unsafe to rely on and act upon the retracted confessions unless, upon a consideration of the whole of the evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confessions were true. It is often very difficult, if not impossible, to come to such a conclusion unless " there is," in the words of Kernan, J., in *Queen-Empress* v. *Rangi*,[5] " reliable independent evidence

1 *Giddigadu* v. *Emperor*, (1909) 33 Mad 46; *Nga San Nyein* v. *King-Emperor*, (1917) 3 U. B. R. 3.

2 *Emperor* v. *Santu*, (1917) Cr. Appeals Nos 454 and 455 of 1917, decided by Heaton and Shah, JJ., on November 29, 1917.

3 *Queen-Empress* v. *Gharya*, (1894) 19 Bom 728, *Queen-Empress* v *Gangia*, (1898) 23 Bom 316, *Queen-Empress* v. *Basvanta*, (1900) 25 Bom. 168, 2 Bom. L R. 761

4 *Queen-Empress* v. *Maiku Lal*, (1897) 20 All. 133.

5 (1886) 10 Mad. 295, 313.

to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements." It seems, therefore, to be unsafe in the majority of cases to found a conviction on retracted confessions which are not corroborated by credible independent evidence.[1] A retracted confession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons *tried jointly* with the confessing accused for the same offence. As regards the person making it, a retracted confession may, even without any corroborative evidence, form the basis of a conviction. As regards the other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction, and that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful[2]

The same is the view of the Madras High Court. It holds that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend upon the circumstances under which it was retracted including the reasons given by the prisoner for his retraction.[3] Where the only evidence against two prisoners accused of murder *directly implicating them in the commission of the crime* consisted of confessional statements made by them before the committing Magistrate, which were subsequently retracted, and the statements in such confessions were corroborated in material particulars by other evidence on the record, it was held that the evidence was sufficient to support a conviction.[4]

The Calcutta High Court has ruled that it is not safe to convict an accused on his retracted confession standing by itself uncorroborated,[5] and that to place any reliance on a retracted confession against a co-accused would be most unsafe.[6] A retracted confession should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice

1 [illegible]

[illegible]

4 *Queen-Empress* v. *Raru Nayar*, (1896) 19 Mad 482. See *Queen-Empress* v. *Rangi*, (1886) 10 Mad. 295; *Queen-Empress* v. *Bharmappa*, (1888) 12 Mad. 123.

5 *Queen-Empress* v. *Jadub Das*, (1890) 27 Cal. 295.

6 *Emperor* v. *Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 550

on oath.[1] A confession made out of Court, but retracted during the trial, is admissible in evidence.[2]

CASES.

Where the accused was convicted of house-breaking by night with intent to commit theft, and the only evidence against him was the confession of a fellow-prisoner and the fact that he pointed out the stolen property some months after the commission of the offence, it was held that the mere production of the stolen property by the accused was not sufficient corroboration of the confession of the other prisoner.[3]

A and B were committed for trial, the former for dacoity under s. 395 of the Indian Penal Code, and the latter under s. 412 for receiving stolen property knowing it to be such. A made two confessions, and in both he stated he had handed over to B some pieces of gold and silver stolen at the dacoity. When B was arrested a gold ring and a silver wristlet were found in his possession. At the trial A pleaded guilty and B claimed to be tried. [illegible]

B not having been tried jointly for the same offence, the confession of A was inadmissible as evidence against B; that there was, therefore, no evidence of the identity of the goods stolen at the dacoity with those found in B's possession and the case against him failed.[4]

A person accused of an offence was offered a pardon, the conditions of which he accepted. On being examined, he stated in detail the circumstances of the offence and named another person as an accomplice. He afterwards retracted his statement. It was held that the statement could not be used as evidence against the other person.[5]

Where A and B were being jointly tried, the first for murder and the second for abetment of it, and the charge against the former was altered during the trial to one of abetment of murder, a confession by A was held to have been rightly taken into consideration against B: the original and the amended charges were so nearly related to each other that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from its commencement.[6]

Several persons were charged together with offences under ss. 148, 302, 324 and 326 read with s. 149 of the Penal Code. The

[1] *Yasin* v. *King-Emperor*, (1901) 28 Cal. 689.

[2] *Ah Foong* v. *Emperor*, (1918) 46 Cal. 411.

[3] *Queen-Empress* v. *Dosa Jiva*, (1885) 10 Bom. 231.

[4] *Empress* v. *Bala Patel*, (1880) 5 Bom. 63.

[5] *Queen* v. *Hardeua*, (1873) 5 N. W. P. 217.

[6] *Reg.* v. *Govind Babli Raul*, (1874) 11 B. H. C. 278.

Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court until their respective turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoners during his absence from the Court. It was held that the evidence so given was inadmissible.[1]

The appellant, who was charged under s. 411 of the Indian Penal Code with receiving stolen property, knowing it to be stolen, was tried at the same time with the thief, and one P, who was also charged with receiving stolen property from the same thief, the proceeds of the same theft, but different property. It was held that the appellant and P were not being tried jointly for the same offence, but were tried together for distinct offences punishable under the same section, and, therefore, a confession made by P could not be lawfully considered against the appellant.[2] A prisoner who had escaped from custody during trial, but before charge, and was tried separately after re-arrest, could not be said to have been tried jointly with one whose trial, from a stage prior to the charge, was separate, by reason of the escape from custody, and that the confession of the co-accused, who was first tried, was inadmissible against the prisoner, the trial not having been joint.[3]

Admissions not conclusive proof, but may estop.

31. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

COMMENT.

This section declares that admissions are not conclusive proof of the matters admitted, but that they may operate as estoppels. 'Admission' is defined in s. 15, *supra*; 'estoppel' in s. 115, *infra*. Admissions, whether written or oral, which do not operate by way of estoppel, constitute a kind of evidence, which may be rebutted, against their makers and those claiming under them, as between them and others. An estoppel, *i.e.*, a representation acted on by the other party, by creating a substantive right, does oblige the estopped party to make good his representation, in other words, it is conclusive. An estoppel differs from an admission, for it cannot generally be taken advantage of by strangers. It binds only parties and privies. An estoppel is generally said to be only a rule of evidence, for an action cannot be founded upon it. As a defence it has been held to have the effect of a rule of substantive law. The section says that an admission is not *conclusive* proof, it does not say that an admission is not *sufficient* proof without corroboration. It deals with the effect as to conclusiveness of an admission.

1 *Empress* v. *Chandra Nath*, (1881) 7 Cal. 65.

2 *Maya Singh* v. *The Empress*, (1886) P. R. No. 9 of 1886 (Cr).

3 *Hassan alias Khan* v. *The Emperor*, (1901) P. R. No. 29 of 1901 (Cr).

The expression 'conclusive proof' is defined in s. 4, and when a fact is declared to be conclusive proof of another, a Court cannot allow evidence to be given for the purpose of disproving the fact conclusively proved. All that this section provides is that an admission, unless it operate as an estoppel, is not conclusive. What a party himself admits to be true may reasonably be presumed to be so. The person against whom it is proved is at liberty to show that it was mistaken or untrue. An admission does not estop the party who makes it; he is still at liberty to disprove it by evidence so far as regards his own interest. The rule that admissions are not conclusive is applicable to mistakes in respect of legal liability as well as to those in respect of fact. A plaintiff is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled.[1] But, if the admission is duly proved and if the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in this Act and there is no general principle or rule of law to prevent t [illegible] deciding the case in accordance with it.[2]

[illegible] tion are not restricted to admissions [illegible] place, but are wide enough to include admissions made in pleadings.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:—

When it relates to cause of death;

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they

[1] *Juttendromohun Tagore* v. *Ganendromohun Tagore*, (1872) L. R. Sup. I A. 47; *Jagwant Singh* v. *Silan Singh*, (1899) 21 All 285; *Chandra Kunwar* v. *Chaudhri Narpat Singh*, (1906) 29 All. 184, P.C.

[2] *Maung Mya* v *Ma Tha Ya*, (1897-1901) 2 U. B. R. 377.

were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.

or is made in course of business.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom, or matters of general interest.

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or relates to existence of relationship;

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed relating to family affairs;

(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such decea

4

person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or in document relating to transaction mentioned in section 13 clause (a).

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*).

or is made by several persons and expresses feelings relevant to matter in question

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(*a*) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or

The question is whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(*b*) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(*c*) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(*d*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e*) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f*) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day

The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship

A protest made by the captain, whose attendance cannot be procured, is a relevant fact

(i) The question is, whether a given road is a public way

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character The remarks of a crowd of spectators on these points may be proved.

COMMENT.

Section 60 of the Act lays down that oral evidence must be direct (*vide* that section). This and the following section are exceptions to the general rule that hearsay evidence is not admissible. *Hearsay evidence is excluded on the ground that it is always desirable in the interest of justice to get the person, whose statement is relied upon, into Court for his examination in the regular way in order that many possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed, if they exist, by the test of cross-examination.*

The exceptions to the hearsay evidence have been directed by necessity. The rule excluding the hearsay evidence is relaxed so far as the statements contained in sections 32 and 33. The general ground of admissibility of the evidence referred to in these sections is that no better evidence could be produced. The phrase 'hearsay evidence' is not used in the Code, because it is inaccurate and vague.

Under this section written or verbal statements of relevant facts made by a person—

(a) who is dead;
(b) who cannot be found,
(c) who has become incapable of giving evidence;
(d) whose attendance cannot be procured without unreasonable delay or expense;

are relevant under the following circumstances:—

(1) When it relates to the cause of his death.

(2) When it is made in the course of business; such as, entry in books, or acknowledgment or the receipt of any property, or date of a document.

(3) When it is against the pecuniary or proprietary interest of the person making it or when it would have exposed him to a criminal prosecution.

(4) When it gives opinion as to public right or custom or matters of general interest and it was made before any controversy as to such right or custom had arisen.

(5) When it relates to the existence of any relationship between persons as to whose relationship the maker had special means of knowledge and was made before the question in dispute arose

(6) When it relates to the existence of any relationship between persons deceased and is made in any will or deed or family pedigree, or upon any tombstone or family portrait, and was made before the question in dispute arose.

(7) When it is contained in any deed, will, or other document.

(8) When it is made by a number of persons and expresses feelings relevant to the matter in question.

Section 30 does not limit the operation of this section.

1 **'Statements, written or verbal, of relevant facts'**—'Verbal' means by words. It is not necessary that the words should be spoken. The words of another person may be adopted by a witness by a nod or shake of the head.[1] If the significance of the signs made by a deceased person in response to questions put to her shortly before he[illegible] to the mind of the Court, then [illegible]nt or dissent to them, clearly pr[illegible] as to the cause of her death.[2]

In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the [illegible]

and [illegible]he signs made by her in answer to such questions It was held

1 *Qu[illegible]een-Empress* v. *Abdullah*, 1885) 7 [illegible]All. 385, 397, F B.
2 *Quee[illegible]n-Empress* v. *Abdullah, sup.*; *Emperor* v. [illegible]e *Sadhu Charan Das*, (1921) 49 Cal 600; *Chandrika Ram Kahar* v. *King-Emperor*, (1922) 1 Pat. 401; *Ranga* v. *The Crown*, (1924) 5 Lah. 305.

by a Full Bench of the Allahabad High Court that the questions and the signs taken together might properly be regarded as 'verbal statements' made by a person as to the cause of her death within the meaning of this section, and were, therefore, admissible in evidence under that section.[1]

Clause 1.—Cause of death.—Dying declarations are admissible under this clause. They are admissible only where the death of the deceased is the subject-matter of the charge and the circumstances of the death are the subject of the dying declaration.[2] Thus the statement of a deceased person, who did not himself charge the accused with having wounded him, to the effect that another person, also deceased, was stabbed by the accused, is not admissible in evidence.[3] Similarly, the dying declaration of a person that he had committed the murder, of which another was charged, was not admitted [4]

A petition of complaint and the examination of the complainant on oath under s 200 of the Criminal Procedure Code are admissible as dying declarations.[5]

A dying declaration may be proved by the evidence of a witness who heard it made. It cannot be treated as deposition unless made in the presence of the accused and before a Magistrate.[6] This case has been distinguished in a later case in which it has been held that the written record of a dying declaration, not taken down in the presence of the accused, is admissible when it is proved by a witness that the statements contained therein were, in his presence, recorded by a Magistrate and read over to the deceased who admitted their correctness.[7] When a dying declaration is recorded by a Magistrate, who is not a committing Magistrate, it must be proved by calling the Magistrate as a witness [8] A dying declaration recorded by a Magistrate cannot be accepted in evidence without proof.[9]

The writing cannot be admitted to prove the statement made. It may be used to refresh the witness's memory. It is no objection to the admissibility of a dying declaration that it was made in answer to leading questions or obtained by earnest and pressing solicitations.[10] Any method of communication between mind and mind may be a
of the hand, a
woman whose

[1] *Queen-Empress* v. *Abdullah*, (1885) 7 All 385, 397, F. B.

[2] *AutanSingh* v. *The Crown*, (1923) 4 Lah. 451.

[3] *Fakir* v. *The Empress*, (1900) P. R No 17 of 1901 (Cr).

[4] *Gray*, Jr. Cir. Rep. 76.

[5] *Gouridas Namasudra* v *Emperor*, (1908) 36 Cal 659

[6] *The Empress* v. *Samiruddin*, (1881) 8 Cal. 211, followed in *Sarat Chandra Kar* v *Emperor*, (1924) 52 Cal 446 See, however, *Abdul Jalil* v. *The Empress*, (1886) P. R No 13 of 1886 (Cr).

[7] *Emperor* v. *Balaram Das*, (1921) 49 Cal 358.

[8] *Reg.* v. *Fata Adaji*, (1874) 11 B. H. C. 247, 248.

[9] *Ghazi* v. *The Crown*, (1911) P. R. No 17 of 1911 (Cr.).

[10] *Queen-Empress* v. *Abdullah*, (1885) 7 All. 385, 398, F. B.

[11] *Mockabee* v *Com*, 78 Ky 382.

to her by the Sub-Inspector, certain gestures, from which the latter inferred that she accused her husband of the assault, it was held that the gestures were admissible in evidence, but that the opinion of *witnesses as to the meaning of the gestures* was *not* admissible.[1] Because the interpretation of the gestures is for the Court alone and the opinion of the witnesses as to the meaning of such gestures is not evidence. The declaration, however, should be complete. An *incomplete statement* is inadmissible.

If the person making a dying declaration chances to live, his statement is inadmissible as a dying declaration under this section, but it might be relied on under the provisions of s. 157 to corroborate his testimony when examined.[2]

English law.—Under the English law the declaration must be by a person who can be a competent witness. Under the Indian [illegible] ... person to bear [illegible]

The second provision of this clause differs from the English law.

A dying declaration is admissible whether the person who made it was or was not, at the time when it was made, 'under expectation of death.' Under the English law the declarant—

(1) must have been in actual danger of immediate death at the time of making the declaration;

(2) must have been fully aware of his danger; and

(3) must have died.

Under this clause a dying declaration is admissible in civil as well as criminal cases [*vide* s. 111, (*a*)]. Under the English law it is admissible only in the case of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration

The English rule on this point does not rest on any sound principle, and is, therefore, not adopted in this Act.

Cases.—In proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the [illegible] ...tion of the deceased witness was [illegible] It was held that the evidence [illegible] ...f this section or s. 33 notwithstanding the additional charges before the Sessions Court.[3]

1 Chandrika Ram Kahar v. King-Emperor (1922) 1 Pat. 401.

2 Emperor v. Rama Sattu, (1902) 4 Bom. L. R 434, 435.

3 *The Empress* v. *Rochia Mohato*, (1881) 7 Cal. 42.

Where the declaration of a person wounded by the accused in [illegible]

dacoity, or that it was the transaction which resulted in his death, the High Court held that his declaration ought not to have been admitted in evidence [1]

The accused were charged under s. 330 of the Penal Code with having, for the purpose of extorting a confession, caused hurt to one R who committed suicide in consequence of the ill-treatment. The question was whether a statement made by R as to the cause of his wounding himself with a razor (which caused his death) was admissible in evidence in the case, the accused not being charged with having caused the death of R It was held that, as there was no doubt that the suicide of R was the result of the ill-treatment by the accused, that treatment was the cause, though not the direct cause, of the death and although the accused were not legally responsible for the suicide, the cause of death came into question in this case, the whole affair, ill-treatment and subsequent suicide, being all one transaction, and consequently the statement of the deceased was admissible under cl. 1 of this section.[2]

A was present amongst a band of dacoits engaged in committing dacoity. He was there in his capacity of assistant to the police to whom he had previously given information that a dacoity was going to take place. He was mortally wounded by the police. He made a "dying statement" incriminating certain persons as his companions. It was held that such statement could not be admitted as evidence in the trial of his companions for dacoity under this clause as the cause of his death came into question only indirectly and incidentally.[3]

Clause 2.—"The considerations which have induced the Courts to recognize this exception appear to be principally these—that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth."[4]

1 [illegible]

2 [illegible]

3 *Nga Te v. King-Emperor*, (1913) 7 L. B. R. 33.

4 Taylor, 11th Edn., s 697, p. 477.

to her by the Sub-Inspector, certain gestures, from which the latter inferred that she accused her husband of the assault, it was held that the gestures were admissible in evidence, but that the opinion of witnesses as to the meaning of the gestures was not admissible.[1] Because the interpretation of the gestures is for the Court alone and the opinion of the witnesses as to the meaning of such gestures is not evidence. The declaration, however, should be complete. An incomplete statement is inadmissible.

If the person making a dying declaration chances to live, his statement is inadmissible as a dying declaration under this section, but it might be relied on under the provisions of s. 157 to corroborate his testimony when examined.[2]

English law.—Under the English law the declaration must be by a person who can be a competent witness. Under the Indian Evidence Act the question of the competence of the person to bear testimony is not one which affects the admissibility of the statement under any of the clauses of the section.

The second provision of this clause differs from the English law.

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1 [illegible]handrika Ram Kahar v. King-Emperor (1922) 1 Pat. 401.

2 Emperor v. Rama Sattu, (1902) 4 Bom. L R. 434, 435.

3 The Empress v. Rochia Mohato, (1881) 7 Cal. 42.

Where the declaration of a person wounded by the accused in committing dacoity was made on the 13th August, 1899, and he died on 20th August, 1899, and there was no other evidence to prove that the death was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, the High Court held that his declaration ought not to have been admitted in evidence.[1]

The accused were charged under s. 330 of the Penal Code with [illegible] to one [illegible] atment. The question was whether a statement made by R as to the cause of his wounding himself with a razor (which caused his death) was admissible in evidence in the case, the accused not being charged with having caused the death of R. It was held that, as there was no doubt that the suicide of R was the result of the ill-treatment by the accused, that treatment was the cause, though not the direct cause, of the death and although the accused were not legally responsible for the suicide, the cause of death came into question in this case, the whole affair, ill-treatment and subsequent suicide, being all one transaction, and consequently the statement of the deceased was admissible under cl. 1 of this section.[2]

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[1] [illegible]

[2] [illegible]

[3] *Nga Te v. King-Emperor,* (1913) 7 L. B. R. 33.

[4] Taylor, 11th Edn., s. 697, p. 477.

'Statement in course of business.'—This clause provides that a written statement of a relevant fact made by a person who is dead is itself a relevant fact, when the statement was made by such person in ' the ordinary course of business.' The expression ' course of business ' occurs in more than one place in this Act. See ss. 16, 34, 47, 114

There are certain important distinctions between the English and the Indian rules which regulate the reception of entries as made by a deceased person in the regular course of business. For instance, [illegible] making the entry [illegible] enters ; but there [illegible]quires that entries in accounts should, in order to be relevant, be regularly kept in the ordinary course of business ; and although it may, no doubt, be important to show that the person making or dictating the entries had, or had not, personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value and not the admissibility of the entries.[1]

Under the English law, to render entries made in the course of business admissible, they must be proved to have been made contemporaneously with the facts which they relate. This clause does not contain any such restriction.

The phrase *in the ordinary course of business* is apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce. The rule laid down in this clause extended only to statements made during the course, not of any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The particulars set out in this clause, though not exhaustive, may fairly be taken as indicating the nature of the statements made in the course of business The expression, *in the ordinary course of business*, in this clause, must mean in the ordinary course of a professional avocation.[2]

The entries should have been made by the deceased person himself. Entries made by another person at his instance are not admissible under this section.[3]

The phrase, *in the ordinary course of business*, does not apply to any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but to business or professional employment in which the declarant was ordinarily or habitually engaged. The " business " referred to may be of a temporary character.[4] See illustrations (*b*), (*c*), (*d*), (*g*) and (*f*).

1 *Reg.* v. *Hanmanta*, (1887) 1 Bom 610

2 *Ningawa* v. *Bharmappa*, (1897) 23 Bom. 63

3 *Mussamat Naina Koer* v. *Gobardhan Singh*, (1916) 2 P. L. J. 42.

4 *Sheonandan Singh* v. *Jeonandan Dusadh*, (1908) 13 C. W. N. 71.

Account books.—Entries in account books should, in order to be relevant, be regularly kept in the course of business.[1]

It is only such books as are entered up as transactions take place that can be considered as books regularly kept in the course of business within s 34 [2]

The plaintiff relied on entries in the handwriting of her deceased husband kept in the ordinary course of his business. It was held that entries in accounts relevant only under s. 34 of this Act are not alone sufficient to charge any person with liability: corroboration is required. But where accounts are relevant also under this clause, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under s. 34, require corroboration Entries in accounts may in the same suit be relevant under this clause: the necessity of corroboration prescribed by s. 34 does not arise. Though accounts which are relevant under this clause do not as a matter of law require corroboration, the Judge is not bound to believe them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact.[3]

Cases.—Account books.—In a suit to recover money due upon a running account the plaintiffs produced their account books, which were found to be books regularly kept in the course of business in support of their claim. One of the plaintiffs gave evidence as to the entries in the account books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting, or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. It was held that the evidence given as above should be interpreted in the manner most favourable to the plaintiffs, and might be accepted in support of the entries in the plaintiffs' account books, which by themselves would not have been sufficient to charge the defendants with liability.[4]

Marriage register.—A register of marriages kept by the Kazi, since deceased, who celebrated the marriage, in which register was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within this clause.[5]

Samadaskat book.—Entries of payments made by a creditor in the ledger (*samadaskat* book) belonging to the debtor fall within

1 *Reg. v. Hanmanta*, (1877) 1 Bom. 610

2 *Muncherskaw Bezonji v. The New Dhurumsey S & W. Company*, (1880) 4 Bom. 570.

3 *Rampyarabai v. Balaji Shridhar*, (1904) 28 Bom. 294; 6 Bom. L. R. 50

4 *Dwarka Das v. Sant Bakhsh*, (1895) 18 All. 92.

5 *Zakeri Begum v. Sakina Begum*, (1892) 19 Cal 689, P C

this clause, and although they are admissions in his own favour they are not precluded by s. 21.[1]

Clause 3.—'Statement against the interest of maker.'—This clause is based upon a knowledge of human nature. Self-interest induces a man to be cautious in saying anything against himself. When one makes a declaration in disparagement of his own rights or interests, it is generally true, and because it is so the law has deemed it safe to admit evidence of such declarations.

Declarations against interest should, to be admissible, have been against interest at *the time they were made*, and it is no answer that they might possibly turn out to be so subsequently.[2] They are relevant though the declarant had no personal knowledge of the facts therein mentioned, but received them merely on hearsay[3]; though he himself would have been incompetent as a witness to testify[4]; and though he had an interest or motive to misstate the facts which render the declarations of no value.[5] The confession of an accused person who is dead implicating himself and an accomplice in a crime is admissible under this clause and is not excluded by ill. (*b*) to s. 30[6] The question of admissibility is not a question of value.

This clause comprises three classes of declarations against interest: (1) where they affect the declarant's pecuniary interest; (2) his proprietary interest; and (3) his personal liberty or property by tending to charge him with a crime or to subject him to payment of damages.

The form of the declaration is immaterial; it may be verbal or written, in a deed or a will or any other document.

This clause renders relevant a statement which would have exposed a man to a criminal prosecution. Under the English law such statement is not admissible.

Cases.—The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead. It was held that the statement in the deed was admissible under this clause as a statement against the pecuniary or proprietary interest of the mortgagor.[7]

[1] *Jethibai v Putlibai*, (1912) 14 Bom. L. R. 1020.

[2] *Ex parte Edwards*, (1884) 14 Q B. D. 415.

[3] *Create v. Barrett*, (1835) 1 C. M & R 919

[4] *Gleadow v Atkin*, (1833) 1 C. & M. 410.

[5] *Taylor v. Witham*, (1876) 3 Ch. D. 605.

[6] *Nga Po Yin v. King-Emperor*, (1904-06) U. B. R. (Evi) 3.

[7] *Ningawa v. Bharmappa*, (1897) 23 Bom. 63.

A statement by a landlord, who is dead, that there was a tenant on the land is a statement against his proprietary interest and admissible under this clause.[1]

In a suit to redeem a house and a garden, part of the property covered by a deed of heirship executed by a Hindu widow in favour of plaintiff's father, and which property had been mortgaged by the widow's husband, the defendant denied the plaintiff's right to redeem on the ground that neither he nor his father was heir of the mortgagor. The plaintiff tendered the deed of heirship in support of his right. It was held that the document was admissible under this clause, as it was manifestly a declaration by the widow against her proprietary interest, for by it she divested herself of her widow's interest in the property.[2]

If a person have peculiar means of knowing a fact, and make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death, if he could have been examined to it in his life-time. And therefore an entry made by a man midwife of having delivered a [illegible]

A statement made by a deceased person in his will that he had spent a certain amount in effecting repairs to his house was held to be not admissible in evidence as it was not a statement made against his pecuniary or proprietary interest.[4]

In a trial for forgery, one of the co-accused had made a statement before the inquiring Magistrate, but he died before the trial commenced. The statement was let in under this section. It was held that the statement was inadmissible since its maker had already rendered himself liable to criminal prosecution at the time it was made.[5]

Clause 4.—'Opinion as to public right or custom.'—The admissibility of the declarations of deceased persons in cases of public right or custom, or matters of public or general interest, is allowed as these rights or customs are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; direct proof of their existence is not, therefore, demanded.[6]

The principle on which the exception of reputation regarding public rights rests is this—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the

1 *Abdul Aziz Molla* v. *Ebrahim Molla*, (1904) 31 Cal. 965.

2 *Hari Chintaman Dikshit* v. *Moro Lakshman*, (1886) 11 Bom. 89.

3 *Higham* v. *Ridgway*, (1808) 10 East 109

4 *Narhari* v. *Ambabai*, (1919) 22 Bom. L. R. 57.

5 *Emperor* v. *Keshav Narayan*, (1913) 25 Bom. L. R. 248.

6 *The Queen* v. *Inhabitants of Bedfordshire*, (1855) 4 E. & B. 535.

existence of an ancient right, of which direct proof cannot be given in most cases.[1]

The admissibility of the declarations of deceased persons in such cases is sanctioned, because in local matters, in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject.[2]

Public and general rights.—Public rights are those common to all memt [illegible]
fishery. G[illegible]
of the com[illegible]
The right must have been one of whose existence the declarant should be aware. If the declaration is made otherwise than upon the [illegible] ted.
[illegible] ocument purporting to deal [illegible] as against the public, in w[illegible] the subject-matter of the statement.[3]

Illustration (*i*) exemplifies this clause.

Statement before any controversy had arisen.—The declarations should have been made *ante litem motam, i.e*, before the beginning of any controversy and not simply before the commencement of any suit involving the same subject-matter. The operation of bias is thus excluded.[4]

To make a statement inadmissible on the ground that it was made *post litem motam* the same thing must be in controversy before and after the statement is made.[5]

Case.—The lower Court had admitted in evidence a statement [illegible] Kudwa
I. [illegible] with-
[illegible] this
clause was not applicable to the case, as the evidence was required to prove a fact in issue, and not merely a relevant fact. The statement was, therefore, inadmissible to prove the alleged custom.[6]

Clause 5.—Statements as to existence of relationship.—Statements relating to the existence of any relationship between persons

1 *Wright* v. *Tatham*, (1888) 5 Cl. & F. 670.

4 *Berkely Peerage case*, (1811) 4 Camp. 401, 417.

5 *Kalka Prasad* v. *Mathura Prasad*, (1908) 30 All. 510, P. C.

6 *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*, (1890) 15 Bom. 565.

alive or dead as to whose relationship the declarant has *special means* of knowledge are admissible if they are made before the question in dispute was raised.

Illustration (*k*) exemplifies this clause. See also ill. (*l*).

English law.—According to English law, a certain degree of relationship is necessary in order to make such statements admissible. Declarations respecting matters of pedigree are not, therefore, admissible if they proceed from illegitimate members or friends or servants, or neighbours of family in question. This Act only requires the existence of any special means of knowledge of the relationship on the part of the person making the statement.

Marriage.—Strict proof of marriage is necessary in certain criminal offences, *e g.*, bigamy, adultery, enticing away a married woman This clause has no application in such cases.[1] Otherwise general reputation of marriage is admissible.

Cases.—The statement in a genealogical table filed by a member of the family, before any question arose as to the latter, is relevant under this clause [2]

A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person.[3]

A document, ancient and genuine, purporting to be a family [illegible] one Jiraj. [illegible] which the [illegible] of certain property, was in question. Jiraj stated that he had received the pedigree from his grandfather. It was not proved who had prepared the pedigree. It was held that it was not necessary to show who had made the statements mentioned in the pedigree and that it was admissible in evidence under this section.[4]

The oral evidence in a case consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such of these statements as were made since 1847 were inadmissible in evidence under cls. 5 and 6 as being *post litem*. The Judicial Committee held that they were admissible, the heirship of the then claimants not being really in dispute at that time.[5] Where the respondent claimed to be a grand-daughter of the deceased, her father having predeceased the grandfather, and there being no other

1 *Empress* v. *Pitamber Singh*, (1879) 5 Cal 566, F B.

2 *Shyamanand Das Mohapatra* v. *Rama Kanta Das Mohapatra*, (1904) 32 Cal. 6.

3 *Jagatpal Singh* v. *Jageshar Bakhsh Singh*, (1902) 25 All. 143, P. C.

4 *Jahangir* v. *Sheoraj Singh*, (1915) 37 All 000

5 *Bahadur Singh* v. *Mohar Singh*, (1901) 24 All. 94, P. C.

blood relations surviving to give evidence to relationship, it was held that evidence of general repute was of considerable importance, provided it was cogent.[1]

A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence.[2]

For the purpose of the decision of a question of limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiff, who were since deceased, relating to the date of the plaintiff's birth. It was held that such statements were admissible in evidence.[3] A statement as to the age of a member of a family made by a sister was held admissible after her death.[4] In an action to recover the amount due upon certain mort-

similar entries with regard to his family. It was held under an Ordinance exactly similar to the Indian Evidence Act that having regard to ill. (*l*) to s 32 the entry was admissible in evidence.[5]

Case in which the plaint in a former suit verified by a deceased member of the family, and as such having special means of knowledge was held admissible under this clause, to prove the order in which certain persons were born and their ages.[6] In a suit to recover possession of property which had belonged in her life-time to F, one of the material issues was whether the plaintiffs were, or were not, the sons of M, paternal uncle of F. In support of their statement that they were the sons of M the plaintiffs tendered in evidence the plaint in a suit, filed some years before this litigation in which F as plaintiff had impleaded them as defendants, describing them as the sons of M. It was held that this plaint was not only admissible evidence on the subject of the plaintiff's relationship to M but was evidence to which considerable weight might be attached.[7]

Evidence of competent witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives.[8]

1 *Ma Hmun* v. *Ma Ngwe Thin*, (1923) 1 Rang. 34.

5 *Mahomed Syedol* v *Yeoh Ooi*, (1916) 43 I. A 256, 19 Bom. L. R. 157.

6 *Dhanmull* v *Ram Chunder Ghose*, (1890) 24 Cal. 265.

7 *Mauladad Khan* v. *Abdul Sattar*, (1917) 39 All. 426.

8 *Debi Pershad Chowdhry* v. *Radha Chowdhrain*, (1904) 32 Cal 84, P. C.

In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, it was held that such a statement was inadmissible as evidence of the age of the defendant in support of his defence. The Court said the illustration (*l*) to this section would be material in cases of pedigree; but the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes.[1]

The plaintiff, to prove his relationship, produced a pedigree which was prepared from the statements of bards and papers produced by them, some time ago by a Raja to settle the class of Thakurs to which he belonged. It was held that the pedigree was not admissible; since neither any of the bards nor the Raja who assembled the bards of the family and with their assistance had the pedigree drawn up was called as a witness and no proof was given that they were within any of the descriptions given by this section which made it unnecessary to call them.[2]

Clause 6.—Statement as to relationship in a will or deed.—Under this clause statements relating to the existence of relationship between deceased persons made before the question in dispute was raised are admissible when they are contained in a will or a deed or in a family pedigree, or upon a tombstone. It is not necessary as in cl. 5 that the statements should have been made by a person who had special means of knowledge, simply because it is not probable that a person would insert in a will or a solemn deed any matter the truth of which he did not know.

The word 'verbal' used in the beginning of this section has no application to this clause.

Illustrations (*l*) and (*m*) exemplify this clause.

Difference between clauses 5 and 6.—Clause (5) refers to statements relating to the existence of any relationship between persons alive or dead, and the statement is to be made by a person who had special means of knowledge, that is, it imposes the restriction that the person making the statement should have special means of knowledge. Clause (6) refers to the existence of relationship [illegible] h restriction as [illegible] a will or deed [illegible] pedigree, etc., no matter by whom it was made. Clause (6) also refers to pedigree, but differs from cl. (5) in this:—that in cl. (5) the evidence is the declaration of the person deceased or otherwise unproduceable; in cl. (6) the evidence is that of things, such as genealogical trees, tombstones, etc.

[1] *Bipin Behary Daw v. Sreedam Chunder Dey*, (1886) 13 Cal 42.

[2] *Surjan v Sardar*, (1900) 2 Bom. L. R. 942, 23 All. 72, P. C.

Cases.—Horoscope—In a suit to recover possession of immovable property the plaintiff tendered in evidence a horoscope which, he said, had been given to him by his mother and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. It was held that the horoscope was not admissible.[1] This case has been distinguished in a Madras case where the defendants relied on a horoscope produced by the plaintiff's mother and which had been a public record from a period *ante litem motam* and was put in as an admission under ss 17 and 18.[2]

Pedigree table—In a suit for an inheritance claimed by the plaintiffs, alleging themselves to be collateral relations and heirs of the last male owner, through an ancestor common to him and to them, a pedigree table was put in evidence. The persons from whose statements at no distant date the pedigree had been drawn up were absent, and it had not been shown that this had been for any one or other of the reasons contained in this section. It was held that the pedigree table was inadmissi
to be proved by the books kep
by the chroniclers from time to
by members of the family. It
admissible under this clause and also under cl. 2[4]

Clause 7.—A statement contained in any deed, will, or other document which relates to a transaction by which a right or custom in question was created, modified, recognized, asserted, or denied, is admissible under this clause.

The word 'verbal' used in the beginning of this section naturally does not apply to this clause as well.

Under this clause the word 'right' will include both public
e of reputa-

rule as to ancient possessions is extended or enlarged; for now a statement in any relevant document, however recent, and though not more than thirty years' old, will be admissible.[5]

Clause 8.—When a number of persons assemble together to give vent to one common statement, which statement expresses the

1 *Ram Narain Kallia* v. *Monee Bibee*, (1883) 9 Cal 613; *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk*, (1890) 17 Cal. 849

2 *Raja Goundan* v. *Raja Goundan*, (1893) 17 Mad 134.

3 *Surjan* v. *Sardar*, (1900) 2 Bom L. R 942; 23 All 72, P. C.

4 *Mohansing* v. *Dalpatsing*, (1921) 24 Bom L. R. 289.

5 Norton, p 192.

6 *The Queen* v. *Ram Dutt Chowdhry*, (1874) 23 W. R. (Cr.) 35, 38

meetings were admitted[2], evidence that a plaintiff was publicly laughed at in consequence of a libel was admitted to prove that the libel referred to the plaintiff.[3]

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

33. Evidence given by a witness in a judicial proceeding,[1] or before any person authorized by law to take it[2], is relevant[3] for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead[a] or cannot be found,[b] or is incapable of giving evidence,[c] or is kept out of the way by the adverse party,[d] or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable[e].

Provided—

that the proceeding was between the same parties[4] or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine[5];

that the questions in issue were substantially the same in the first as in the second proceeding.[6]

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

COMMENT.

Evidence of depositions of former trials is admissible as it forms an exception to the hearsay rule. Depositions are in general admissible only after proof that the persons who made them cannot be produced before the Court to give evidence. It is only in cases where the production of the primary evidence is beyond the party's power that secondary evidence of oral testimony is admissible. This section enumerates the cases in which the evidence given by a witness (*a*) in a judicial proceeding, or (*b*) before any person authorised by law to take it, is relevant in a subsequent

[1] *Redford* v. *Birley*, (1822) 1 St Tr. N S, 1071, 3 Stark, 76.

[2] *Regina* v. *Vincent*, (1840) 9 C. & P. 275.

[3] *Cook* v. *Ward*, (1830) 4 M. & P. 99.

judicial proceeding or a later stage of the same proceeding. Such cases are five in number, *viz* :—

(*a*) when the witness is dead ;

(*b*) when he cannot be found ;

(*c*) when he is incapable of giving evidence ;

(*d*) when he is kept out of the way by the adverse party; and

(*e*) when his presence cannot be obtained without an amount of delay or expense which the Court considers unreasonable.

The use of such secondary evidence is limited by three provisos. Such evidence will be only admissible—

(1) if the proceeding was between the same parties, or their representatives in interest ;

(2) if the adverse party in the first proceeding had the right and opportunity to cross-examine ; and

(3) if the questions in issue were substantially the same in the first as in the second proceeding.

Evidence given on a different occasion is also admissible to contradict a witness (s. 155) or to corroborate him (s. 157).

1. 'Evidence given in a judicial proceeding.'—"It must be proved that the witness was *duly sworn* in some judicial proceeding, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*."[1] Evidence of a witness in a proceeding subsequently pronounced to be one *coram non judice* is not admissible.[2]

2. 'Before any person authorised by law to take it.'—A deposition is inadmissible unless it was taken by an officer or other person authorised by law.

3. 'Is relevant.'—Depositions which satisfy the conditions laid down in this section are relevant for the purpose of proving the truth of the facts which they state. They are, however, open to all the objections which might have been raised if the witness himself had been present during the trial. Leading and other illegal questions are, therefore, not allowed to go in.

The burden of proving that the conditions essential to the admissibility of depositions under this section have been complied with lies on the person who tenders the evidence. The depositions of witnesses given in a counter-case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them.[3]

Depositions satisfying the conditions of this section may be received in evidence at any subsequent stage of the case before another Court. The power given by this section requires to be

1 Taylor, 11th Edn., s. 465, p. 344.
2 *Rami Reddi*, (1881) 3 Mad. 48, 51.
3 *Queen-Empress* v. *Ganu Sonba*, (1888) 12 Bom. 440.

exercised with great caution and the Court must insist on strict proof before holding that the requisite conditions have been satisfied.[1]

Evidence not otherwise admissible, or which would have been liable to rejection if any objection were taken to it, may be perfectly good evidence if admitted by the consent of the parties.[2]

Objections as to the admissibility of evidence should be raised at the trial and at any rate in the Court of first appeal and will not as a general rule be entertained by the High Court if raised for the first time in second appeal.[3]

(a) **'When the witness is dead.'**—The death of the witness whose evidence is to be admitted should first be strictly proved unless it is admitted on the other side.

The deposition of a witness, who was not cross-examined before the committing Magistrate and who died before the trial, was held admissible because the accused had the right and opportunity of cross-examining him notwithstanding the omission of their pleader to avail himself of that right.[4]

(b) **'Cannot be found.'**—Proof of a diligent search is necessary before tendering the evidence of a witness who cannot be found. A Sessions Judge, finding that the witnesses, who had been summoned to give evidence for the prosecution, did not appear on the date fixed, adjourned the case for eighteen days and ordered fresh summonses to be issued. On the adjourned date, the witnesses were again absent. Thereupon the Sessions Judge made use of the evidence, which those witnesses had given before the committing Magistrate, purporting to do so under this section. It was held that the evidence could not be so used; but the Sessions Judge ought to have directed warrants to issue to enforce the attendance of the prosecution witnesses and compelled their attendance in the Court.[5]

Section 512 of the Code of Criminal Procedure supersedes this section to a certain extent. It provides that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions.

(c) **'Incapable of giving evidence.'**—There must be an incapacity of a permanent character, and not of a momentary or temporary character.[6] But in a later case the Calcutta High

[1] *Maung Nyo* v. *King-Emperor*, (1923) 1 Rang. 512.

[2] *Lakshman* v. *Amrit*, (1900) 24 Bom. 591; *Radha Kishan* v. *Kedar Nath*, (1924) 46 All 815.

[3] *Radha Kishan* v. *Kedar Nath*, (1924) 46 All. 815.

[4] *Queen-Empress* v. *Baswanta*, (1900) 2 Bom L R 761, 25 Bom. 168.

[5] *Dost Muhammad* v. *King-Emperor*, (1905) 2 A. L. J. R. 399, 25 A. W. N. 202.

[6] *In re Pyari Lall*, (1879) 4 C. L. R. 504.

Court has held that the incapacity contemplated by the section is not necessarily a permanent one and that something short of permanent incapacity might satisfy the words of the section.[1]

Precise evidence should be given as to the nature of the illness and the incapacity to attend. When a witness is shown to be insane, his evidence, given in a former judicial proceeding, is relevant in a subsequent judicial proceeding.

(*d*) **'Kept out of the way.'**—The admissibility of the evidence given by a witness who is kept out of the way by the adverse party is admissible upon the broad principle of justice which will not permit a party to take advantage of his own wrong.

(*e*) **'Presence cannot be obtained without an amount of delay or expense, etc.'**—It is only in extreme cases of expense or delay that the personal attendance of a witness is dispensed with, and his evidence given in a former inquiry referred to.[2] The Judge must satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. Mere consent of the prosecutor and the accused's pleader to that effect is not sufficient.[3] Inconvenience to witnesses or amount of expense is no ground where the entire case rests on the evidence of those witnesses.[4]

(4) **'Proceeding between the same parties.'**—The two suits must be brought by, or against, the same parties, or their representatives in interest, at the time when the suits are proceeding and the evidence is given[5] This proviso is based on the grounds of reciprocity, because the right to use evidence being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour which, had it been tendered against him, would have been clearly inadmissible. R charged A with breach of trust, and S gave evidence in support of the charge. A being acquitted, R was tried for making a false charge and S for perjury. It was held that the depositions given by witnesses in the first case could be used against R in the second case, but not against S under this section.[6]

(5) **'Adverse party has the right and opportunity to cross-examine.'**—This proviso is based on the fundamental principle in the administration of justice that every man should have an opportunity of cross-examining witnesses whose evidence is to be used against him. If the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then same in effect as if he had cross-examined. It is not necessary that

1 *Empress* v. *Asgur Hossein*, (1881) 6 Cal. 774.

2 *Empress of India* v. *Mulu*, (1880) 2 All. 646.

3 *Re Annavi Muthiriyan*, (1915) 39 Mad. 449.

4 *Queen-Empress* v. *T. Burke*, (1884) 6 All. 224.

5 *Sitnath Dass* v. *Mohesh Chunder Chuckerbati*, (1886) 12 Cal. 627.

6 *Rami Reddi*, (1881) 3 Mad. 48, 51. See *Emperor* v. *Kadhe Mal*, (1919) 42 All. 24.

the opponent should have exercised his right of cross-examining, for the depositions will be relevant if he deliberately forbore from, or waived the absence of, an opportunity for cross-examining.

The words " [illegible] " do not imply that the actual [illegible] or his agent before the trib[illegible] To make evidence admissible against an accused person under this section the fact that he had full opportunity of cross-examination must be proved.[2]

(6) 'The questions in issue must be substantially the same in the two proceedings.'—The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may be given in the subsequent proceeding. Thus, if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies though the last suit relates to other lands. Whether [illegible] depends upon wh[illegible] different consequer[illegible] the same question is substantially in issue in both the proceedings, it does not matter that they relate to different transactions or property[5] A prosecution was instituted by S against N at the instance and on behalf of F for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. S gave evidence at the trial in support of these charges F subsequently brought a civil suit against N for possession of the same house under s. 9 of the Specific Relief Act. S died before the institution of the civil suit. At the trial of the civil suit the deposition of S in the criminal Court was tendered by F as evidence on the issue of possession. It was held that, S being dead and the proceedings being between the same parties and the issues being substantially the same, the deposition of S was admissible.[6] In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were com-

[1] *M'Combie* v *Anton*, (1843) 6 M & G. 27.

[2] *Queen-Empress* v. *Ramchandra Govind Harshe*, (1895) 19 Bom 749. *Sadu* v. *The Empress*, (1885) P R. No. 26 of 1885 (Cr)

[3] *Rami Reddi*, (1881) 3 Mad 48, 51.

[4] *The Empress* v *Rochia Mohato*, (1881) 7 Cal 42

[5] *Llanover* v *Homfray*, (1881) 19 Ch D 224.

[6] *Foolkissory Dassee* v *Nobin Chunder Bhunjo*, (1895) 23 Cal. 441.

mitted for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charges of grievous hurt. The deposition of the deceased witness was put in and read at the sessions trial. It was held that the evidence was admissible either under s. 32, cl. 1, or this section, notwithstanding the additional charges before the Sessions Court.[1]

Explanation.—This explanation is intended to do away with the objection that, in criminal cases, the Crown is a prosecutor.[2] The effect of the explanation is that the deposition taken in criminal proceedings may be used in a civil suit, and *vice versa*.

The use of a deposition in a criminal case in a subsequent civil action is subject to the provisions of this section. The introduction and use of such depositions in bulk in a subsequent civil suit for the purpose of either contradicting or discounting the evidence of witnesses given in the suit, are illegitimate, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered.[3]

CASES

Where the only evidence that a witness could not be found was the statement of a police officer, that search had been made for him to summon him but he could not be found, that a warrant was also issued and that he was a man of another district, but no warrant was produced and there was no evidence of any attempt to serve it, or, if so, of what was done for the purpose, it was held that sufficient ground had not been established for the admission of the previous deposition of the witness under this section.[4]

In a trial before the Sessions Court, the presiding Judge admitted into evidence the deposition of a witness given before the Magistrate, under the provisions of this section, although the witness was alive, resided within the jurisdiction of the Court, and his attendance could have been procured without any very great delay or expense. The Judge having relied on the evidence in his charge to the jury, it was held that the deposition ought not to have been admitted at all. The application of this section in criminal cases ought to be confined within the narrowest limits. Where a witness is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. Where the evidence of a witness is not material, there is no need to introduce it under this section. It can only be in

[1] *The Empress* v. *Rochia Mohato*, (1881) 7 Cal. 42.

[2] *Soojan Bibee* v. *Achmut Ali*, (1874) 14 Beng. L. R. App. 3.

[3] *Bal Gangadhar Tilak* v. *Shrinivas Pandit*, (1915) 17 Bom L R. 527, 39 Bom 441, P. C.

[4] *Emperor* v. *Kangal Mali*, (1905) 41 Cal 601.

very extreme cases that it is right to make use of the evidence of an absent witness under this section in a criminal trial where that evidence, if true, would be extremely material.[1]

In an appeal from a conviction of theft, the Sessions Judge set aside the conviction and entered upon an enquiry for the purpose of ascertaining whether proceedings should not be instituted against the complainant for making a false charge of theft. In the course of those proceedings, the accused in the theft case was examined as a witness and the complainant cross-examined him. Ultimately the Sessions Judge ordered the complainant to be committed for trial on the charge of making a false charge of theft. At the trial as the presence of the accused in the theft case could not be procured, his statement before the Sessions Judge was allowed to go upon the record. The admission of this statement was objected to as being against the provisions of this section. It was [illegible] upon the record, inasmuch as [illegible] Judge having been held un[illegible] Code, the then complainant had no right to cross-examine the then accused when he made the statemnet.[2]

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in books of account when relevant

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence[2] to charge any person with liability.

Illustration

A sues B for Rs 1,000, and shows entries in his account books showing B to be indebted to him to this amount The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

COMMENT.

This section is based upon the principle that entries made regularly in the course of business are sure to be accurate. In all such entries the writer has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth.

Such books are admissible under s 32 (2) as statements made by a person in the ordinary course of business or entries made by him in books kept in the ordinary course of business. Such books are also relevant under section 159 to refresh the memory of the writer.

English law.—Under English law such entries are not admissible in evidence on the ground that to admit such evidence

1 *Emperor v Lakshman Tolaram*, (1915) 17 Bom L R 500

2 *Emperor v Bakir Saheb Amir Saheb*, (1916) 18 Bom L R 284.

is a violation of the rule that no man shall be allowed to manufacture evidence in favour of himself. To make entries in the course of business admissible, they must be shown to have been made contemporaneously with the acts which they relate. Even then such entries are evidence only of those things which it was the duty of the person to enter, and are no evidence of independent collateral matters There is no such restriction in the section.

1. **'Regularly kept in the course of business.'**—The Bombay High Court has held that, books of account must be entered up from day to day or from hour to hour as transactions take place. Where a pe[illegible] at intervals of a week or fortnight, [illegible]-books, the latter furnishing him wit[illegible]om loose memoranda or orally, it was held that such books could not be received as evidence under this section [1]

But the Calcutta High Court has dissented from this view and has laid down that the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards, make them irrelevant. The course of business in keeping the accounts in the office of a Talukdari estate was that monthly accounts were submitted by Karindas at the head office where they were abstracted and entered in an account book, under the date of entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. It was held that the entry in the account book was admissible as corroborative evidence of oral testimony to the fact of a payment, for what it was worth, objection being only to be made to its weight, not to its relevance, under this section [2] Though the actual entries in books of account regularly kept in the course of business are relevant, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.[3] Books regularly kept in the course of business can be used for the purpose of refreshing the memory of a witness [4]

Account books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth

1 *Munchershaw Bezonji v. The New Dhurumsey S. & W. Company*, (1880) 4 Bom 576.

2 *The Deputy Commissioner of Bara Banki v Ram Parshad*, (1899) 27 Cal. 118, P. C

3 *The Queen-Empress v. Grees Chunder Banerjee*, (1884) 10 Cal 1024

4 *Bhog Hong Kong v. Ramanathen Chetty*, (1902) 29 Cal 334, P. C.

of the facts stated, if regularly kept in the course of business, are admissible as evidence under this section [1]

2. **'Such statement shall not alone be sufficient evidence.'**—Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability. Corroboration is required. One party, by merely producing his own books of account, cannot bind the other.[2] But where accounts are relevant also under s. 32 (2), they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under this section, require corroboration. Entries in account may, in the same suit, be relevant under both the sections; and in that case the necessity for corroboration does not apply.[3]

Relevancy of entry in public record made in performance of duty

35. An entry in any public or other official book, register or record,[1] stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

COMMENT.

This section is based upon the circumstance that in the case of public documents entries are made in discharge of public duty by an officer who is an authorised and accredited agent appointed for the purpose The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity.

Scope.—In a case the Calcutta High Court held that the section is confined to that class of cases where a public officer has to enter in a register or other book some actual fact which is known to him [4] But this case has not been approved of in a later decision in which it is held that certified copies of entries in a register kept by a public servant under a statute are admissible in evidence.[5] However, the privilege given to public record under this section does not extend to entries which the public officer is not expected to, and is not permitted to, make [6]

1 *Reg v Hanmanta*, (1877) 1 Bom 610

2 *Hira Bhagat v Gobind Ram*, (1897) P R No 63 of 1897, *Abdul Ali v. Puran Mal*, (1914) P R No 82 of 1914; *Bichha Lal v Jai Pershad*, (1899) P R No 45 of 1899

3 *Rampyarabai v Balaji Shridhar*, (1904) 6 Bom L R 50; 28 Bom 294

4 *Saraswati Dasi v Dhanpat Singh*, (1882) 9 Cal 431

5 *Shoshi Bhooshun Bose v Girish Chunder Mitter*, (1893) 20 Cal 940; *Rai Bhaiya Dirgaj v Beni Makto*, (1917) 20 Bom L R 712, P C

6 *Ali Nasir Khan v Manik Chand* (1902) 25 All 90, F B

To render a document admissible under this section three conditions are necessary:—

(1) The entry that is relied upon must be one in any public or other official book, register or record;

(2) it must be an entry stating a fact in issue or a relevant fact; and,

(3) it must be made by a public servant in the discharge of his official duty, or any other person in performance of a duty specially enjoined by the law.[1]

English law.—To render entries in public books or registers admissible, they must have been made promptly or at least without such long delay as to impair their credibility and in the mode required by law. There is no such restriction in this section. Again, English law speaks only of official registers or books.

1. 'Public or other official book, register, or record.'—Section 74 of the Act specifies what public documents are. A register of births and deaths kept by village officials under the orders of the Board of Revenue is a public document within the meaning of this section, and an entry in such register recording the death of a person is evidence of the actual. date of his death.[2] Entry in the Municipal Register of Deaths,[3] or Land Record Register[4] is admissible. Entry in the Survey Records is insufficient in the absence of other reliable evidence to prove a mortgage.[5]

A recital in a judgment not *inter partes* of a relevant fact is not admissible in evidence under this section.[6]

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Relevancy of statements in maps, charts and plans.

COMMENT.

This section mentions two kinds of maps or charts, *viz.*, (1) published maps or charts generally offered for public sale; (2) maps or plans made under the authority of Government. The admissibility of the first kind rests upon the ground that they contain the result of inquiries made under competent authority concerning matters in which the public are interested. The publications being accessible to the whole community and open to the criticism of all,

1 *Samar Prasadh* v. *Juggul Kishore Singh*, (1895) 23 Cal. 366.

2 *Ramalinga Reddi* v. *Kotayya*, (1917) 41 Mad 26

3 *Anis-Ul-Rahman Khan* v. *Beni Ram*, (1901) P. R. No 59 of 1901.

4 *Po Gaung* v. *Ma Shwe Bwin*, (1908) 4 L B R. 231.

5 *Mi Se Baw* v. *Mi Min Ya*, (1907-09) 2 U B R (Evi) 19

6 *Seethapati Rao Dora* v *Venkanna Dora*, (1922) 45 Mad. 332.

the probabilities are in favour of any inaccuracy being challenged and exposed. The admissibility of the second class rests on the ground that, being made and published under the authority of Government, they must be taken to have been made by, and to be the result of, the study or inquiries of competent persons.

To render inquisitions, reports, surveys, and other similar documents admissible in evidence as public documents, it must appear they were made for the purpose of the public making use of them and being able to refer to them, for the fact that the public are interested in the documents, and are in a position to challenge or dispute them, if inaccurate, invests them with a certain amount of authority [1]

Maps, charts, or plans, made for a particular purpose, even under the authority of Government, are not admissible in evidence. *It must appear that they were made for the purpose of the public* making use of them.

Neither this section nor s 83 has any application to maps prepared for private purposes, that is, for the purpose of any particular suit or by any Government Officer for any special purpose.

A map made by a Deputy Collector for the purpose of the settlement of land forming the silted bed of a river, is not one which is admissible in evidence under this section and s. 83 of the Act; but it is a map the accuracy of which must be proved before it can be admitted in evidence.[2]

Relevancy of statement as to fact of public nature contained in certain Acts or notifications

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909, or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.

COMMENT.

Statutes, State-papers, and other writing of a similar character are admissible in evidence as conclusive proof of the facts stated

[1] Taylor, s 1709A, p 1277, *Rahmat-Ullah Khan v. Secretary of State for India*, (1913) P R No 63 of 1913

[2] *Kanto Prashad Hazari v. Jagat Chandra Datta*, (1895) 23 Cal. 335.

any Court from taking cognizance of a suit, or holding a trial. It is intended to include all cases in which a general law relating to *res judicata inter partes* applies. A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them. It cannot be admitted in evidence where the parties are different either as 'transactions' under s. 13, or as evidence of relevant facts under s. 11, or under any other section of the Act.[1] The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants. *Res judicata* means, by its very words, a thing upon which the Court has exercised its judicial mind.

The principle of this section applies to criminal Courts as well. The plea of *autrefois convict* or *autrefois acquit*, that is, of a previous lawful conviction or lawful acquittal, has always been held to be a good plea. See s. 403, Criminal Procedure Code.

The judgment of a criminal Court that a person did or did not commit an offence, does not operate as *res judicata* to prevent a civil Court from determining such questions for purposes of a suit.[2]

CASE.

The complainant filed a civil suit against the accused to recover moneys due on certain items. He next filed a complaint charging the accused with criminal breach of trust with reference to some of the items covered by the civil suit. The suit terminated into a dismissal of the plaintiff's case, it having been disbelieved by the trial Judge on all items. The accused then applied to admit the judgment in the civil case in evidence and to obtain a discharge on the strength of it. The Magistrate having declined to receive it in [illegible] High Court. It was held that [illegible] ought to have been [illegible] il liability was determined by a competent Court, the judgment of that Court would be the best evidence of the civil rights of the parties.[3]

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any

Relevancy of certain judgments in probate, etc., jurisdiction.

1 *Gujju Lall v. Fatteh Lall*, (1880) 6 Cal. 171, F. B.

2 *Ram Lal v. Tula Ram*, (1881) 4 All. 97. See *Bishen Das v. Ram Labhaya*, (1915) P. R. No. 106 of 1915.

3 *In re N. V. Markur*, (1914) 18 Bom L. R. 185

specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease ;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

COMMENT.

This section deals with what are usually called judgments *in rem*, *i.e.*, judgments which are conclusive not only against the parties to them but also against all the world. A judgment *in rem* has been defined to be " an adjudication pronounced, as its name indeed denotes, upon the status of some particular subject-matter, by a [illegible]"[1] This rule [illegible] one who can [illegible] think fit, to appear and assert his own rights, by becoming an actual party to the proceedings ; partly upon the ground that judgments in *rem* not merely declare the status of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be ; and partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful, but that after having been clearly defined by one solemn adjudication, they should conclusively be set at rest.[2] Judgments *in rem* can only be impeached if it can be shown :—

(1) that the Court had no jurisdiction ; or

(2) that the judgment was obtained by fraud or collusion ; or

[1] Taylor, 11th Edn., s. 1674, p. 1136.

[2] Taylor, 11th Edn., s. 1676, 1140

(3) that it was not given on the merits; or

(4) that it was not final, *e.g.*, interlocutory.

There is no distinction between a judgment *in rem* and a judgment *in personam*, excepting that in the one the point adjudicated upon, which is always as to the status of the *res*, is conclusive against all the world as to that status, whereas in the other the point is only conclusive between parties and privies. A judgment *in personam* is the ordinary judgment between parties in cases of contract, tort, or crime. It is no proof of the truth either of the decision or of its grounds as between strangers, or a party and a stranger. Under this section a judgment given by a competent Court in the exercise of (1) probate, (2) matrimonial, (3) admiralty, or (4) insolvency, jurisdiction will be conclusive proof as to the legal character conferred on, or taken away from, any person or to which any person is declared to be entitled.

(1) Probate jurisdiction.—The grant of probate under the Probate and Administration Act (V of 1881), is conclusive proof of the title of executors and of the genuineness of the will admitted to probate The conclusiveness of the probate rests upon the declared will of the legislature as expressed in ss 12 and 59 of the Probate Act. The grant of probate is the method which the law specially provides for establishing the will.

This section is not applicable to the judgment of the Probate Court.[1] A judgment of a Court of Probate is conclusive proof that the person to whom letters or probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else, and that a question of status decided by a Court of Probate can be raised again.[2]

The judgment of a Probate Court, refusing probate, takes away from the executors named in the will their legal character as such, and this result is final as against all persons interested under the will.[3]

(2) Matrimonial jurisdiction.—This jurisdiction is conferred on Courts by the following Statutes:—

(*a*) The Indian Divorce Act (IV of 1869) relating to the divorce of persons professing the Christian religion.

(*b*) Act XV of 1865 relating to marriage and divorce among Parsis.

(*c*) The Native Converts' Marriage Dissolution Act (XXI of 1866).

(*d*) The Indian Christian Marriage Act (XV of 1872).

(*e*) Act relating to marriage between persons not professing the Christian, Jewish, Hindu, Mahomedan, Parsi, Buddhist, Sikh, or Jain religion (Act III of 1872).

1 *Kalyanchand* v. *Sitabai*, (1913) 16 Bom. L. R. 5, 38 Bom. 309, F. B.

2 *Mi Ngwe Zan* v *Mi Shwe Taik*, (1910) 1 U. B. R. (1910-13) 61, 63.

3 *Chinnasamy* v. *Hariharabadra*, (1893) 16 Mad. 380

A judgment of a Matrimonial Court decreeing divorce or nullity of marriage is binding as to the status of the parties concerned. It is conclusive upon all persons that the parties have been divorced and that they are no longer husband and wife.

(3) **Admiralty jurisdiction.**—Admiralty jurisdiction is conferred on several High Courts by Letters Patent It is also conferred on mofussil Courts by 12 & 13 Vic. c. 88. The decision of a Prize Court is conclusive upon all the world Judgment delivered in an ordinary suit in an Admiralty Court is not a judgment *in rem* binding strangers.

(4) **Insolvency jurisdiction.**—This jurisdiction is conferred on the High Courts by the Presidency Towns Insolvency Act (III of 1909) and on mofussil Courts by the Provincial Insolvency Act (V of 1920) Orders passed in insolvency bind strangers as well.

A creditor who has unsuccessfully opposed his debtor's application in the Bombay High Court to be declared an insolvent, on the ground, *inter alia*, that he had made fraudulent transfers of property, is bound by the decision of that Court and cannot in a subsequent suit filed in the Punjab raise the plea that the transfer of the property was fraudulent and void, notwithstanding that the property concerned is situate in that province.[1]

CASES.

The executors named in a will, executed in the mofussil, applied for probate of the will. The Court refused probate on the ground that the testator was not at the time of a sound disposing mind. The testator's widow filed a regular suit against the defendants, as executors *de son tort*, to recover possession of the testator's property. The defendants again set up the will and claimed to be invested

not a judgment such as was contemplated in this section. The only kind of negative judgment which was contemplated was that which expressly took away from a person the legal character which had up to that time subsisted[2] The defendant as widow had applied for letters-of-administration to the estate of B Her status had been denied, and the question had been fought out at length in the proceedings under the Probate and Administration Act In a suit brought against her for the estate on the ground that she was not a widow and had no right to inherit from B, it was held that the question of the defendant's status could be fought out again, and that this section had no application.[3]

1 *Ram Narain* v. *Durga Dat*, (1912) P. R No 55 of 1912

2 *Kalyanchand Lalchand* v *Sitabai*, (1913) 38 Bom 309, 16 Bom L. R. 5, F. B. See *Lalit Mohan Das* v. *Radharaman Saha*, (1911) 15 C W N 1021, *Maqbul Shah Ahmad* v. *Muhammad Azmat*, (1917) P R No. 49 of 1918.

3 *Mi Ngwe Zan* v. *Mi Shwe Taik*, (1910) 1 U. B R (1910-13) 61

Judgment based on a compromise.—A previous judgment passed on a compromise is not a judgment *in rem* within the meaning of this section and is therefore no bar to a subsequent suit.[1]

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41

42. Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration

A sues B for trespass on his land B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists

COMMENT.

Under this section judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. It also forms an exception to the general rule that no one shall [illegible] party or [illegible] verdicts, judgments, and other adjudications upon subjects of a *public nature,* such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or sea-walls, moduses, and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputation—will also be received, and this, too, whether the parties in the second suit be those who litigated the first, or be utter strangers. The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be strangers to the parties in the first, the judgment, though admissible, will not be conclusive.[2] Under this section the decrees of competent Courts are good evidence in matters of public interest, such as the existence of a custom of succession in a particular community,[3] or of a custom under which a tenure is held.[4] A judgment in a crimi-

1 *Rahmat Ali Khan (Pir)* v. *Mussammat Bubu Zuhra,* (1911) P. R. No. 14 of 1912.

2 Taylor, 11th Edn., s. 1683, p 1144

3 *Bai Baiji* v. *Bai Santok,* (1894) 20 Bom. 53.

4 *Dalglish* v. *Guzuffer Hassain,* (1896) 23 Cal. 427.

nal case is not a matter of a public nature and is not admissible in evidence in civil proceedings under this section.[1]

Section 40 admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit Section 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. And this section admits all judgments not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the enquiry.[2]

Whether judgments, orders or decrees, of a Court are transactions within the meaning of s. 13 has been much disputed. This section suggests that they are not, otherwise it would be useless to say that they are admissible if of a ' public nature ' when s. 13 makes them admissible without that qualification.

Judgments, etc., other than those mentioned in sections 4 to 42, when relevant.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.[1]

Illustrations

(*a*) A and B separately sue C for a libel which reflects upon each of them C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification The fact is irrelevant as between B and C.

(*b*) A prosecutes B for adultery with C, A's wife

B denies that C is A's wife, but the Court convicts B of adultery

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(*c*) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction As between A and C, the judgment against B is irrelevant.

(*d*) A has obtained a decree for the possession of land against B C, B's son, murders A in consequence

The existence of the judgment is relevant, as showing motive for a crime

(*e*) A is charged with theft and with having been previously convicted of theft The previous conviction is relevant as a fact in issue.

(*f*) A is tried for the murder of B The fact that B prosecuted A for libel

1 *Bishen Das* v *Ram Labhaya*, (1915) P. R. No 100 of 1915

2 *Gujju Lall* v. *Fatteh Lall*, (1880) 6 Cal. 171, F. B.

and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

COMMENT.

This section expressly contemplates cases in which judgments could be admissible under other sections of the Act, which are not admissible under s 40, 41 or 42. The cases contemplated by this section are those where a judgment is used not as *res judicata*, or as evidence more or less binding upon an opponent by reason of the adjudication which it contains. But the cases referred to in this section are such as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon [illegible], the conviction of A [illegible] like any other fact [illegible] A had been actually guilty of the forgery or not [illegible] This would be one of the many cases alluded to in this section.[1]

This section declares that judgments, orders and decrees, other than those mentioned in ss 40, 41 and 42, are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections, *qua*-judgments, orders and decrees, but it must not be taken to make them absolutely inadmissible when they are the best evidence of something that may be proved *aliunde*.[2]

To have the effect of *res judicata*, a judgment *inter partes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under s. 11 or 13 as exceptions recognized under this section, as relevant evidence. Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property.[3]

Judgments admissible only under this section and s 13 must be restricted to proving the transaction or the instance meant by the section.[4]

Admissibility of judgments in civil and criminal matters.—A judgment in a criminal case cannot be received in a civil action

1 *Gujju Lall* v. *Fatteh Lall*, (1880) 6 Cal. 171, 192, F. B See *The Secretary of State for India* v. *Syed Ahmad Badsha*, (1921) 44 Mad 778, F. B ; *Indar Singh* v. *Fateh Singh*, (1920) Lah. 540

2 *The Collector of Gorakhpur* v. *Palakdhari Singh*, (1889) 12 All 1, F B.

3 *Lakshman* v. *Amrit*, (1900) Bom. 591, 598, 599

4 *Mahamad* v. *Husan*, (1906) 9 Bom L. R. 65 ; 31 Bom 143

to establish the truth of the facts upon which it is rendered, and a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution.[1]

1. 'Or is relevant under some other provisions of this Act.'— These words clearly show that there are other provisions in this Act, under which judgments not *inter partes* are relevant; for instance, under ss. 8, 11, 13, 14 and s. 54, explanation (2), judgments not *inter partes* are relevant [2] Illustrations (*d*), (*e*) and (*f*) explain the meaning of the last words of this section and are examples of judgments being relevant otherwise than under ss. 40, 41 and 42.

CASE.

In deciding a suit for damages arising from a malicious prosecution, the [illegible]
given befo [illegible]
evidence ir [illegible]
[illegible]

that it was not permissible to the Judge to utilize the judgment of the Magistrate in the way he did; and that this section and s. 13 or s. 11 did not apply to the case.[3]

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party,[1] was delivered by a Court not competent to deliver it,[2] or was obtained by fraud or collusion.[3]

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved

COMMENT.

This section provides that a party to a suit or other proceeding may show that a judgment, order, or decree, which is relevant under s. 40, that is, which would, as a judgment *inter partes*, operate as *res judicata*, or which is relevant under s. 41, that is, which is evidence as judgment *in rem*, or which is relevant under s. 42, that is, which is evidence as judgment relating to a public matter, and which is proved by the adverse party, was passed by a Court which had no jurisdiction to pass it or was obtained by fraud or collusion[4]. It is not necessary for the party against whom such judgment, order or decree is sought to be used to bring a separate suit to have it set aside, but it is open to such party in the same suit in which such

[1] *Raj Kumari Debi* v *Rama Sundari Debi*, (1896) 23 Cal 610, 613; *Ram Lal* v *Tula Ram*, (1881) 4 All. 97

[2] See *Wazir* v *Queen-Empress*, (1895) P. R. No 7 of 1895 (Cr.).

[3] *Gulabchand* v. *Chunilal*, (1907) 9 Bom. L. R 1134

[4] *Rajib Panda* v. *Lakkan Sendh Mahapatra*, (1899) 27 Cal 11, 20

judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.[1]

This section lays down not only a rule of law relating to evidence, but also a rule of procedure. There are many sections of this Act, such as ss. 66-73, 130, 135, 136 and 150, which relate more or less to matters of procedure

The right of a party to set aside by a suit a judgment or decree on the ground of fraud, exists independently of the provisions of this Act.[2]

English law.—In England a party to a suit would not be allowed to defeat a judgment by showing that, in obtaining it, he had practised an imposition upon the Court. Under this Act, however, there is no such restriction. This section permits any party to a suit or other proceeding to show that a judgment was obtained by fraud or collusion. The words "any party to a suit or other proceeding" are wide enough to include both innocent and guilty party to the first suit.

1. 'Which has been proved by the adverse party.'—The judgment or decree which the section allows a party to impeach on the ground of fraud must be one which has been proved by the adverse party.

2. 'Delivered by a Court not competent to deliver it.'—Every species of judgment will be rendered inadmissible in evidence on proof given that the Court which pronounced it had no jurisdiction.

The "competency" of a Court and its "jurisdiction" are synonymous terms. They mean the right of a Court to adjudicate in a given matter. They do not mean, in a case where that right exists, the coming to a correct conclusion upon any question of law or fact arising in that matter.[3] The words "not competent" refer to a Court acting without jurisdiction.[4] Either party or a stranger against whom a previous judgment is used in a subsequent suit may impeach it on the ground of want of jurisdiction.

3. 'Obtained by fraud or collusion.'—'Fraud' is an extremely collateral act which vitiates the most solemn proceedings of Courts of justice.[5] The term 'fraud' is defined in s. 17 of the Indian Contract Act. There must be actual or positive fraud, that is, there must be an intention to cheat or deceive another person to his injury.

'Collusion' means a deceitful agreement or compact between two or more persons to some act in order to prejudice a third person, or

1 *Bansi Lal* v *Dhapo*, (1902) 24 All 242, *Rajib Panda* v. *Lakhan Sendh Mahapatra*, (1899) 27 Cal 11.

2 *Venkatappa Naick* v. *Subba Naick*, (1905) 29 Mad. 179

3 *Sardarmal* v. *Aranvayal Sabhapathy*, (1896) 21 Bom. 205

4 *Ketlilamma* v. *Kelappan*, (1887) 12 Mad. 228

5 *Meadows* v *Duchess of Kingston*, (1775) 2 Amb 756.

for some improper purpose It may be of two kinds: (1) when the facts put forward as the foundation of the judgment of the Court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.[1]

A judgment or decree obtained by fraud upon a Court binds not such Court nor any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding.[2] In applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm; in all cases it is alike competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[3] A Court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit.[4]

It is always competent to any Court to vacate any judgment or order if it be proved that such judgment or order was obtained by manifest fraud.[5]

Whether parties to a suit may set up their own fraud has not been definitely decided.

In *Mahomed Golab* v *Mahomed Sulliman*,[6] Petheram C J. observed :—"The principle upon which these decisions rest is that where a decree has been obtained by fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of justice on a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed, but I am not aware that it has ever been suggested in any decided case; and in my opinion it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but also of that which relates to *res judicata* as well"

A distinction exists between those cases in which the fraud is only attempted but not carried into effect and those in which it

[1] Wharton

[2] *The Queen* v *Saddlers' Company*, (1863) 10 H L C 404, 431

[3] *Nistarini Dassi* v *Nundo Lal Bose*, (1899) 26 Cal 891

[4] *Sarthakram Maiti* v. *Nundo Ram Maiti*, (1906) 11 C. W. N 579

[5] *Paranjpe* v. *Kanade*, (1882) 6 Bom 148, 150

[6] (1894) 21 Cal 612, 619.

has actually been carried into effect. In the former case a party attempting to commit fraud is not precluded from maintaining an action to set aside the fraudulent transaction; but in the latter case he is not allowed to take advantage of his own wrong and is precluded from maintaining an action to set aside the fraudulent transaction actually carried into effect [1]

CASE.

In a suit brought by A against B for possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to possession The defence was that the decree was a fraudulent one. It was held that under this section the defendant could show that the decree was obtained by fraud [2]

OPINIONS OF THIRD PERSONS, WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

Such persons are called experts.

Illustrations.

(*a*) The question is, whether the death of A was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c*) The question is, whether a certain document was written by A Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

1 See *Goberdhan Singh* v. *Ritu Roy*, (1896) 23 Cal. 962; *Banka Behary Dass* v. *Raj Kumar Dass*, (1899) 27 Cal. 231; *Govinda Kuar* v. *Lala Kishun Prosad*, (1900) 28 Cal 370; *Honapa* v. *Narsapa*, (1898) 23 Bom. 406; *Sham Lall Mitra* v. *Amarendro Nath Bose*, (1895) 23 Cal 460.

2 *Rajib Panda* v. *Lakhan Sendh Mahapatra*, (1899) 27 Cal 11.

COMMENT.

This section is an exception to the rule as regards the exclusion of opinion evidence.

It is "a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature."[1] The opinions of skilled witnesses cannot be received on a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it.[2]

All persons who practised a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required It is the duty of the Judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert. The Court is bound to defer to the opinion of an expert where skill and experience alone render a person a competent judge. In the case of an expert witness there exists the tendency to support the view which is favourable to the side which employs him so that it is difficult to get from him an independent opinion.

Where experts are called to pronounce their opinions on scientific questions, they may refresh their memory by referring to professional treatises.

It is necessary for the admission of the evidence of a handwriting expert, that the writing with which the comparison is made should be admitted or proved beyond doubt to be that of the person alleged, and that the comparison made should be made in the open Court in the presence of such person [3]

If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite counsel [4]

Facts bearing upon opinions of experts

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

1 Taylor, 11th Edn., s. 1418, p. 970.

2 *Ibid*, s 1419, p 970

3 *Suresh Chandra Sanyal v. Emperor* (1912) 39 Cal 606.

4 Per Woodroffe, J., in *Jarat Kumari Dassi v. Bissessur Dutt*, (1911) 39 Cal 245.

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant

(*b*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant

COMMENT.

An exception to the general rule, which lays down that evidence of collateral facts cannot be received, arises "where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to illustrate the opinions of scientific witnesses. Thus, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.[1]

Opinion as to handwriting when relevant.

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

[1] Taylor, 11th Edn., s. 337, p. 247; *Folkes* v. *Chadd*, (1782) 3 Doug. 157.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

COMMENT.

This section indicates one of the methods of proving handwriting. The handwriting of a person may be proved in the following ways .—

(1) By the evidence of the writer himself

(2) By the evidence of a person who has seen the person, whose handwriting is in question, write [1]

(3) By the evidence of a person acquainted with such handwriting either by receiving letters purporting to be written by the person in answer to documents written by the witness or under his authority and addressed to that person or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him

(4) By the evidence of an expert in comparing the handwriting.

(5) By the Court comparing the document in question with any others proved to the satisfaction of the Court to be genuine.

(6) The Court may also direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words alleged to have been written by such person

A witness need not state in the first instance how he knows the handwriting, since it is the dut
cross-examination the sources
with the testimony as it star
presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting.[2]

1. **'Habitually.'**—This word means 'usually' 'generally' or 'according to custom' It does not refer to the frequency of the occasions *but rather to the invariability of the practice* A record-keeper, who in the course of his official duty has to file papers sent to him, is competent to testify to the handwriting of a person whose papers are so filed, though the number of such papers may not be numerically great [3]

1 *In the matter of a First Grade Pleader*, (1914) P R No 18 of 1915

2 *Shankar* v *Ramji*, (1903) 5 Bom. L. R 663, 28 Bom 58

3 *Emperor* v. *Ponde* (No 2), (1925) 27 Bom L. R 1031; 8 Bom Cr. C. 75

Opinion as to existence of right or custom, when relevant.

48. When the Court has to form an opinion as to the existence of any general custom[1] or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

COMMENT.

Under this section opinions of person who are in a position to know of the existence of a custom or usage in their locality are admissible. For example, a person, who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequentl [illegible]
whether [illegible]
the opini [illegible]

This section deals with oral evidence given in Court by the person expressing the opinion. Section 13 applies to all rights and customs, public or private, and refers to specified facts which may be given in evidence. Under s. 32, cl. (4), opinion as to public right or custom of a person, who is dead or who has become incapable of giving evidence, or whose attendance cannot be procured without unreasonable delay or expense, is admissible.

1. 'Custom.'—'Custom' should be distinguished from 'usage.' 'Usage' is a fact and 'custom' is a law. There can be usage without custom, but not custom without usage. 'Usage' is inductive based on the consent of persons in a locality. 'Custom' is deductive making established local usage a law.[2]

Mere opinion evidence is entitled to no weight in matters of custom, and the custom must be proved by specific instances[3]

A custom to be good must be definite.[4]

Explanation.—The explanation indicates that private rights are excluded from the operation of the section Such rights must be proved by facts The word 'general' is an equivalent of the term 'public.'

1 *Sarkyullah Sarkar* v. *Pran Nath Nandi*, (1898) 26 Cal 184

2 Wharton

3 *Rahimatbai* v. *Hirbai*, (1877) 3 Bom 34.

4 *Lachman Rai* v. *Akbar Khan*, (1877) 1 All. 440.

Opinion as to usages, tenets, etc., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

COMMENT.

Under this section usages of trade and other professions are admissible. The opinions of persons experienced therein are admissible.

There are various religious sects in India, and the opinion of persons well-versed in their constitution and tenets will be admissible.

Evidence relating to words that are technical will also be admissible under this section.

This section must be read with s. 51.

Opinion on relationship when relevant

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.

Illustrations

(*a*) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife is relevant.

(*b*) The question is, whether A was the legitimate son of B The fact that A was always treated as such by members of the family, is relevant.

COMMENT.

On a question of pedigree family conduct is admissible to prove relationship, and the treatment of friends and neighbours may be received as presumptive proof of marriage. The opinion on behalf of a family regarding relationship may be inferred from

the family conduct, *e.g.*, distribution of family property; tacit recognition of relations.

Proviso.—The proviso indicates that opinion on relationship cannot be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions for bigamy, adultery, and enticing of married women. The fact of the marriage must be strictly proved in the regular way.[1]

Grounds of opinion when relevant

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion

COMMENT.

Where the opinion of an expert is receivable, the grounds of reasoning upon which such opinion is based may also be inquired into. Opinion is no evidence, without assigning the reason of such opinion The correctness of the opinion can better be estimated in many instances when the reasons upon which it is based are known If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing.

CHARACTER WHEN RELEVANT.

In civil cases character to prove conduct imputed irrelevant.

52. In civil cases the fact that the character of any person concerned is such as to render *probable or improbable any conduct* imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

COMMENT.

The evidence of character relates either (*a*) to character of witnesses, or (*b*) to character of parties. Character of a witness affects his credit and is always material as it helps the Court to come to the conclusion whether his evidence should be treated as trustworthy. Questions touching the character of a witness are allowed to be put to a witness who comes to give evidence in a case.

In respect of the character of a party, t[illegible] distinction[illegible] must be drawn, namely, between the cases wh[illegible] character [illegible] or cri[illegible] [illegible] in a c[illegible] [illegible] of w[illegible]

[1] *Empress* v. *Pitambur Singh*, (1879) 5 Cal. 566, F. B; *Wadhawa* v. *Fateh Muham*[illegible] of [illegible] (Cr) P. R

that general character is, or is not. But, when the general character is not in issue but is tendered in support of some other issue, it is, as a general rule, excluded. So in civil proceedings evidence of character to prove conduct imputed is declared by the Act to be

but the fact that he has a bad character is, except in certain specified cases, irrelevant (ss. 53 and 54) [1]

The general exclusion of character evidence is based on grounds of public policy and fairness, since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come into Court prepared to defend.[2] The business of the Court is to try the case, and not the man, and a very bad man may have a very righteous cause.[3] "The rejection of evidence on the ground of remoteness, or want of reasonable connection between the principal and evidentiary facts, has been shown, . . . to be a branch of that fundamental principle of our law which requires the best evidence to be adduced."[4]

Scope.—This section excludes evidence of character from being given only for the purpose of rendering probable or improbable any conduct imputed to the party But, when the facts which are relevant otherwise than for the purpose of showing character are proved, and those facts raise inferences concerning the character of a party to the suit, such facts become relevant not only to prove the facts for which they were directly tendered, but also for the purpose of showing the character of the party concerned In such a case it is open to the Court to form its own conclusion as to the character of the party, and as to the effect of such character on the conduct imputed to the party.[5]

Character.—The word 'character' occurring in this section and ss 53 and 54 has been defined in the explanation to s. 55.

In criminal cases previous good character relevant.

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

COMMENT.

The principle upon which good character may be proved is that it affords a presumption against the commission of crime This presumption arises from the improbability, as a general rule as proved by common observation and experience, that a man who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and

[1] Woodroffe and Ameer Ali's Evidence, 8th Edn., p 450.
[2] *The Queen* v *Rowton*, (1865) 34 L. J. (M. C.) 57.
[3] Wigmore, 135.
[4] Best, 12th Edn., s. 255, p 234.
[5] Norton, 230.

cases of that crime often occur; but they are exceptions. The rule is otherwise; the influence of this presumption from character will necessarily vary according to the circumstances of different cases.[1]

"Though general evidence of bad character," says Sir J. Stephen, "*is not admitted against the prisoner, general evidence* of good character is always admitted in his favour. This would, no doubt, be an inconsistency justifiable, or, at least, intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to explain conduct. A loses his watch; B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is very poor excuse; but if B is a friend of A's, and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance, to the Rector of the parish, being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell to juries that evidence of character cannot be of use where the case is clearly proved, except in mitigation (or, possibly, aggravation) of punishment; but that, if they have any doubt, evidence of character is highly important. This always seems to me to be equivalent to saying 'if you think the prisoner guilty, say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather the more readily because of it.' Evidence of character would thus be superfluous in every case. The true distinction is, that evidence of character may explain conduct, but cannot alter facts."[2]

Previous bad character not relevant, except in reply.

54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

COMMENT.

Evidence of the bad character of an accused person (of whose good character evidence has not been given) is not relevant under

[1] Wigmore, 123.

[2] General View of the Criminal Law of England, pp 311, 312.

this section for the purpose of raising a general inference that the accused is likely to have committed the offence charged. Such evidence is irrelevant and cannot be legally admitted in evidence whether elicited by the prosecution or by the defence.[1] A man's guilt is to be established by proof of the facts alleged and not by proof of his character; such evidence might create prejudice but not lead a step towards substantiation of guilt.[2]

Where the accused has attempted to show his good character in his own aid under the preceding section, the prosecution may in rebuttal offer evidence of his bad character. The accused by going into his own character gives a challenge to the prosecution. The prosecution, therefore, is at liberty to refute his claim that he has a good character, otherwise the Court would be misled

Explanation 1.—Where the bad character of any person is itself a fact in issue, then the principle of this section does not apply. See section 110 (*f*) of the Criminal Procedure Code.

Explanation 2.—A previous conviction is not admissible in evidence against the accused, except where he is liable to enhanced punishment under s 75 of the Penal Code on account of previous conviction or unless evidence of good character be given, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character[3]

A previous conviction may also be relevant under s 8 as showing motive. It may also become relevant within the meaning of s 14, explanation 2, when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant[4] It may also be relevant under s. 43 See illustration (*e*).

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as affecting damages

Explanation.—In sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but, except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

COMMENT.

In civil cases good character, being presumed, may not be proved in aggravation of damages, but bad character is admissi-

[1] *Mi Myin* v *King-Emperor*, (1905) 5 L. B R 4; *Emperor* v. *Gangaram*, (1920) 22 Bom L R 1274.

[2] *Amrita Lal Hazra* v. *Emperor*, (1915) 42 Cal. 957

[3] *Emperor* v. *Duming*, (1902) 5 Bom L. R. 1034, *Teka Ahir* v *King-Emperor*, (1920) 5 P. L J. 706.

[4] *Emperor* v. *Alloomiya*, (1903) 5 Bom L. R. 805; 28 Bom. 129

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General View of the Criminal

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(1915) 42 Cal. 957

[3] *Emperor* v. *Duming*, (1901) 5 Bom L. R. 1034; *Teka Ahir* v. *King-Emperor*, (1920) 5 P. L. J. 706

[4] *Emperor* v *Alloomiya*, (1903) 5 Bom L. R. 805; 28 Bom. 129

ble in mitigation of damages, provided that it would not, if pleaded, amount to a justification. For example, in cases of defamation the general bad reputation of the plaintiff may be proved. In cases of breach of promise of marriage the plaintiff's general character for immorality is relevant. In cases of seduction evidence of the general character for immorality on the part of the person seduced is relevant. The argument in favour of considering reputation is that the person should not be paid for the loss of that which he never had.

Evidence of reputation or disposition must be confined to the particular traits which the charge is concerned about. Thus, it would be useless to offer evidence of a prisoner's reputation of honesty [illegible]

Explanation.—The word 'character' includes both reputation and disposition. According to English law 'character' is not synonymous with 'disposition,' it simply means reputation. 'Reputation' means what is thought of a person by others, and is constituted by public opinion. 'Disposition' respects the whole frame and texture of the mind. It comprehends springs and motives of actions. 'Temper' influences the action of the moment, 'disposition' is permanent and settled; 'temper' may be transitory and fluctuative. It is possible to have a good disposition with a bad temper and *vice versa*.[2]

[1] Norton, 234

[2] Crabb's Synonyms.

PART II.—ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

Fact judicially noticeable need not be proved

56 No fact of which the Court will take judicial notice need be proved.

COMMENT

All facts in issue and relevant facts must be proved by evidence, either oral or documentary To this rule there are two exceptions: (*a*) facts judicially noticeable, and (*b*) facts admitted

In the case of the facts dealt with by this section, the Judge's [illegible]

of the section will [illegible] this section the last [illegible] come to is this: [illegible] their existence comes into question, the parties who assert their existence, or the contrary, need not in the first instance produce any evidence, in support of their assertions They need only ask [illegible] Judge's [illegible] matter [illegible] parties [illegible] 'udge is [illegible] own for the investigation of facts in general He may resort to any source of information which he finds handy and which he thinks will help him. Thus he may consult any book or obtain information from a by-stander.[1]

Facts of which Court must take judicial notice

57. The Court shall take judicial notice of the following facts :—

(1) All laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India:

(2) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:

[1] Markby, 49

(3) Articles of War for Her Majesty's Army or Navy:

(4) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto.

Explanation.—The word 'Parliament' in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland;

(2) the Parliament of Great Britain;

(3) the Parliament of England;

(4) the Parliament of Scotland; and

(5) the Parliament of Ireland:

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6) all seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor General, or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government:

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown:

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette:

(10) the territories under the dominion of the British Crown:

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons :

(12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it ·

(13) the rule of the road on land or at sea.

In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

COMMENT.

The list of facts of which the Court shall take judicial notice, and which are enumerated in this section is not exhaustive. It is for the sake of convenience that the Courts are allowed to take judicial notice of certain facts which are so clearly established that evidence of their existence is unnecessary

The section does not appear to have the effect of absolving the parties from any rules governing the proof of facts on which they desire to rely. The section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court liberty to resort for its aid to appropriate books or documents of reference on matters of public history.[1]

Clause 1.—'Laws or rules having a force of law' includes statutory law as well as unwritten law whether of a personal or of local nature.

Clause 2.—Statutes are either public or private, general or special. . . A *public* or *general* Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex officio*, although not formerly set forth by a party claiming an advantage under it. But *special* or *private* Acts are rather exceptions than rules, since they only operate upon particular persons and private concerns, and the Courts are not bound to take notice of them, if they are not formally pleaded, unless an express clause,

1 "*The Englishman,*" *Ltd* v. *Lajpat Rai*, (1910) 37 Cal. 760.

is inserted in them that they shall be deemed public Acts and shall be judicially noticed as such without being specially pleaded—which provision is now usually introduced [1]

Clause 3.—Articles of War for native officers, soldiers, etc., are contained in the Indian Army Act (Act VIII of 1911).

Clause 8.—All Courts must take judicial notice of the existence and title of every State or Sovereign recognised by the British Crown. All Native States are so recognised [2]

Clause 9.—The phrase 'divisions of time' includes also Indian eras. Thus Samvat, Shaka, Hindi, Bengali, Hizari and Jalus eras will be judicially noticed Holidays notified in the official Gazette of any Local Government may be judicially noticed.

Clause 13.—On all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference.

Facts admitted need not be proved

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

COMMENT.

This section lays down that no proof need be given of facts which the parties or their agents agree to admit at the hearing, or which, l
their hand
they are de
document
evidence, it was held that the document must be proved.[4]

A Court in general is to try the questions on which the parties are at issue, not those on which they are agreed. Admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel

1 Field, 7th Edn, p 205

2 *The Maharaja of Kashmir* v. *Mohan Lal*, (1886) P. R. No. 51 of 1886.

3 Markby, 50 See *Maung Kat* v. *Maung So*, (1899) 2 U.B R. (1897-1901) 379; *Maung Po Kin* v. *Maung Shwe Bya*, (1923) 1 Rang 405

4 *Maung Wala* v. *Maung Shwe Gon*, (1923) 1 Rang 471

to the admission of any evidence contradicting them.[1] It is with the object of doing away with the necessity of proving documents of facts admitted that admissions are obtained, and the party reasonably refusing or neglecting to admit any documents of facts when called upon to do so may be ordered to pay the costs of proof.

Formal proof of a document even when it is required to be proved in a certain way (*e g.*, by calling a person who has attested it, see s. 68, *infra*) may be waived by any of the parties whose interests it may affect, although such waiver does not affect the legal character of the document or its validity.[2]

In the Civil Procedure Code provision has been made for admission of facts by the parties or their pleaders before the hearing (O. XII, rr. 1-9).

Proviso.—If the Court is satisfied that the admission has been obtained by fraud or that there is other good and sufficient cause, it will be in its discretion under the proviso to require the fact to be proved otherwise than by such admission.[3]

1 *Burjorji Curselji Panthaki* v *Muncherji Kuverji*, (1880) 5 Bom 143, 152

2 *Baijnath Singh* v *Mussammat Biraj Kuer*, (1923) 2 Pat 52; *Arjun Sahu* v *Kelai Rath*, (1922) 2 Pat 317

3 *Oriental Government Security Life Assurance Company, Limited* v *Narasimha Chari*, (1901) 25 Mad 183, 205.

CHAPTER IV.

OF ORAL EVIDENCE.

Proof of facts by oral evidence

59. All facts, except the contents of documents, may be proved by oral evidence.

COMMENT.

Oral evidence has been defined by the Act to be all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry (s 3). All facts except the contents of documents may be proved by oral evidence. Oral evidence, if worthy of credit, is sufficient without documentary evidence to prove a fact or title.

It is a cardinal rule of evidence that where written documents exist, they shall be produced as being the best evidence of their own contents.[1] Where oral testimony is conflicting, much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented.[2]

Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand, may, in the discretion of the Court, be employed. Thus a deaf-mute may testify by signs, by writing, or through an interpreter. So where a dying woman, conscious, but without power of articulation, was asked whether the defendant was her assailant, and if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence.[3]

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

1 *Dinomoni Debi v. Roy Luchmiput Singh*, (1870) 7 I. A. 8.

2 *Meer Usdoollah v. Beeby Imaman*, (1836) 1 M. I. A. 19, 42, 43.

3 Woodroffe and Ameer Ali's Evidence, 8th Edn., p 490; *Queen-Empress v. Abdullah*, (1885) 7 All. 385, F B.

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner ;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable ·

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

COMMENT.

This section, subject to the proviso, excludes opinions given at second hand The use of the word ' must ' in the first clause of the section imposes a duty on the Courts to exclude all oral evidence that is not direct, whether the party against whom it is tendered objects or not.[1]

The word ' direct ' is opposed to mediate or derivative or ' hearsay '

The term *hearsay* is used with reference to what is *done* or *written*, as well as to what is spoken ; and in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that in many cases it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length its intrinsic weakness, its incompetency to satisfy the mind a existence of the fact, and the frauds which might be pract' impunity under its cover.[2]

Markby says : " Section 60 provides that when it (*i.e.* evidence) refers to a fact which could be seen it (*i.e.*, the

[1] Stokes, Vol II, p 89 [2] Taylor, 11th Edn., s. 5

dence) must be the evidence of a witness who says he saw it. This last 'it' is somewhat indefinite; but I think that this 'it' has reference to 'fact' previously spoken of; and I think the fact previously spoken of is the fact deposed to and, therefore, not always the fact which it is ultimately intended to prove. In other words, I do not think that it was intended by this section to exclude circumstantial evidence of things which could be seen, heard, and felt, though the wording of the section is undoubtedly ambiguous, and at first sight might appear to have that meaning."

The expressions 'saw it,' 'heard it,' and 'perceived it,' in cls. 2, 3 and 4 of the section mean 'saw the fact deposed to,' 'heard the fact deposed to,' and 'perceived the fact deposed to.'

A written information is not evidence. If it is desired to make the matter contained in it evidence, a person who can directly testify to such matter must be produced.[1]

"Derivative or second-hand proofs are not receivable as evidence in *causa*..Instead of stating as a maxim that the law requires all evidence to be given *on oath*, we should say that the law requires all evidence to be given *under personal responsibility*, *i.e.*, every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood, which may be inflicted by any of the sanctions of truth...The true principle therefore appears to be this,—that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected."[2]

Derivate or second-hand evidence is excluded owing to its infirmity as compared with its original source.

The Select Committee in their Report said: "This provision taken in connection with the provisions of relevancy contained in Chap. II will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is that:—(1) The sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted; (2) in some excepted cases they are relevant; (3) every act done or word spoken which is relevant on any ground, must (if proved by oral evidence) be proved by someone who saw it with his own eyes or heard it with his own ears."

Proviso 1.—The first proviso is a departure from the rule of English law, under which medical and other treatises are not admissible, whether the author is alive or not. Any scientific textbook commonly offered for sale is admissible in evidence under the circumstances mentioned in the proviso. Section 45 refers to the evidence of living expert witnesses given in Court. Section 38 refers to books on foreign law.

Proviso 2.—This proviso enables the Court to require the production of a material thing for its inspection. Under s. 165 the

[1] *McHauk v. King-Emperor*, (1907) 4 L. B. R. 121.

[2] Best, 12th Edn., ss. 493, 494 pp. 415, 416.

Court has power to direct the production of any document or thing in order to discover or to obtain proper proof of relevant facts.

CASE.

In the trial of the accused in the Sessions Court a Magistrate was called to prove the identifications of the accused in jail and the methods adopted. Instead, however, of stating in Court the details and the results, the witness merely referred to certain documents which were described as exhibits in which he stated that his evidence was to be found. The documents were put on the record as his evidence. It was held that the attempt to record the evidence of the witness in this manner was not only contrary to law but violated the first principles of evidence, and such evidence must therefore be entirely ignored.[1]

1 *Lal Singh* v *The Crown* (1924) 5 Lah 396

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

Proof of contents of documents

61. The contents of documents may be proved either by primary or by secondary evidence.

COMMENT.

Documentary evidence means all documents produced for the inspection of the Court (s. 3). Documents are of two kinds: public and private. Section 74 gives a list of documents which are regarded as public documents. All other documents are private. The production of documents in Courts is regulated by the Civil Procedure Code and the Criminal Procedure Code.

The contents of documents must be proved either by the production of the document which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. The section lays down that the contents of the document may be proved either by primary or secondary evidence and the rule means that there is no other method allowed by law for proving the contents of documents.[1]

Primary evidence is evidence which the law requires to be given first. Secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better record. Primary evidence is defined in s. 62 and secondary evidence in s. 63.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of

[1] *Ram Prasad v. Raghunandan Prasad*, (1885) 7 All. 738, 743.

printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original

COMMENT.

This section defines the meaning of primary evidence It is evidence which the law requires to be given first.

Document executed in several parts.—Sometimes each party to a transaction wishes for the sake of convenience to have a complete document in his own possession. To effect this, the document is written out as many times over as there are parties, and each document is executed, *i e.*, signed or sealed, as the case may be, by all the parties. Any one of them may be produced as primary evidence of the contents of the document.

Document executed in counterpart.—A document is executed in counterparts when there are two parties to the transaction. Thus, if the transaction is a contract between A and B the document

B, the document signed by B is primary evidence If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered.[1]

Where a document is executed in counterpart, each counterpart ... ch counterpart ... it, and second-

Secondary evidence

63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

1 *Philipson* v *Chase*, (1800) 2 Camp 110

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original

(*b*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence, but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original

(*d*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

COMMENT.

This section describes what constitutes 'secondary evidence.' 'Secondary evidence' is evidence which may be given under certain circumstances in the absence of that better evidence which the law requires to be given first.

Clauses 1 to 3 deal with copies of documents. Where a copy of a document is admitted in evidence in the trial Court without objection, its admissibility cannot be challenged in the appeal Court. Because omission to object to its admission implies that it is a true copy and, therefore, it is not open to the appeal Court whether the copy was properly compared with the original or not.[1]

Clause 1.—Section 76 defines the expression "certified copies." See also ss. 77, 78, 79 and 86.

The correctness of certified copies will be presumed under s. 75; but that of other copies will have to be proved. This proof may be [illegible] he has compared [illegible] with what some [illegible] and that such is correct.

Clause 2.—Reading cl. 2 and illustrations (*b*) and (*c*) together it will appear that a copy of a copy, *i.e.*, a copy, transcribed from,

1 *Chimnaji* v. *Dinkar*, (1886) 11 Bom. 320; *Lakshman* v. *Amrit*, (1900) 24 Bom 591; *Kishori Lal* v. *Rakhal Das*, (1903) 31 Cal 155; *Ram Lochan Misra* v. *Pandit Harinath Misra*, (1922) 1 Pat. 606.

and compared with, a copy, is inadmissible, unless the copy with which it was compared was a copy made by some mechanical process

[illegible] when signed and [illegible] for the purpose of proving the contents of the originals (s. 57, Act III of 1877).

Clause 3.—Copies made from the original or copies compared with the original, are admissible as secondary evidence. A copy of a copy, when compared with the original, would be receivable as secondary evidence of the original [ill. (*b*)].

Illustration (*c*) lays down in express language that "a copy [illegible]

of a document, which has not been compared with the original, cannot be admitted in evidence, such a copy being neither primary nor secondary evidence of the contents of the original.[1]

Clause 5.—Secondary evidence includes, according to cl. 5, oral accounts of the contents of a document given by some person who has himself seen the original document. But a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as secondary evidence.[2] This clause does not necessarily mean that a witness who is called to give evidence as to a lost document must have himself read the document. He would be a competent witness if, having physically seen the document, the contents thereof had been read out or explained to him.[3]

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Proof of documents by primary evidence

COMMENT.

This section deals with the class of cases falling within the rule that a written document can only be proved by the instrument itself. What is in a writing shall be proved by the writing itself.

It is a general rule that if a person wants to get at the contents of a written document the proper way is to produce it if he can. Where the contents of any document are in question, either as the fact in issue or a subalternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof

1 *Ram Prasad* v *Raghunandan Prasad*, (1885) 7 All. 738, 743.

2 *Kanayalal* v *Pyarabai*, (1882) 7 Bom. 139.

3 *Mehi Lal* v. *Ramji Das*, (1924) 47 All 13.

aliunde is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it....So, although where the contents of a marriage register are in issue, verbal evidence of those contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it.[1]

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents, or unless the genuineness of a document produced is in question.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

(*a*) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d*) when the original is of such a nature as not to be easily moveable;

(*e*) when the original is a public document within the meaning of section 74;

(*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently

[1] *Balbhadar Prasad* v. *The Maharajah of Betia*, (1887) 9 All 351, 356.

be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

COMMENT.

This section enumerates the seven exceptional cases in which secondary evidence is admissible. Under it secondary evidence may be given of the contents of a document in civil as well as in criminal proceedings. Under the English law stricter proof in criminal than in civil proceeding is required.

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in this section[1] It is incumbent on the person who tenders secondary evidence to show that it is admissible and that the question of admissibility is ordinarily for the Court of first instance.[2] Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given[3]

Clause (a).—The document need not be in the actual possession of the party, it is enough if it is in his power.

The expression 'not subject to' seems intended to include the case of a person not legally bound to produce the document, who refuses to produce it[4]

'Legally bound to produce it.'—The wording of this clause has given rise to considerable doubt. Secondary evidence of a docu-

differing from the English law on the point. But if a person summoned to produce a document objects to do so and his objection is upheld by the Court it seems equally clear that such a document does not fall within the words of this section It may be, however,

[1] *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy*, (1887) 14 Cal 486, 14 I. A. 71

[2] *Abdul Razack* v *Ma U*, (1898) 2 U B R (1897-1901) 382.

[3] *Abdul Razack* v *Ma U*, (1868) 2 U B R (1897-1901) 376.

[4] Stokes Vol II, p 802

that the Courts will admit secondary evidence in such a case upon the general principles of the English law and the decisions of English Courts upon this subject.[1]

'When, after the notice mentioned in s. 66, such person does not produce it.'—This clause means when any person in whose possession or power the original may be, after receiving the notice (if any) required by s. 66, does not produce such original.[2] The sole object of a notice to produce is to enable the adversary to have the document in Court to produce it if he likes, and, if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original.[3]

Clause (b)—This clause must be read with s. 22. Under it the written admission may always be proved. The oral admission can only be proved under the circumstances mentioned *in clauses (a), (c) and (d). But secondary evidence by means* of a written admission under this clause cannot be given of the contents of a document, which is inadmissible for want of registration[4] or of stamps.[5]

Clause (c).—Secondary evidence of a document which is lost or destroyed or cannot be produced in reasonable time can be given. But secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for. Secondary evidence of the contents of a document cannot be given by a party who is in custody of the original document.[6]

To prove the loss of a document, evidence of diligent search is necessary See illustration (*b*) to s. 104. Copies are inadmissible without proof of search of the originals.[7] If a registered sale deed is lost a certified copy can be put in as secondary evidence.[8]

Secondary evidence of a lost public document, other than

[illegible]

...ion, which can be shown to have been last in proper custody, ... been lost, and which is more than thirty years old.

...) 7 Ex. ... (1882) ... Atmaram ... 3. ...esh Prasad,

(1882) 4 All. 406.

7 *Krishna Kishori Chaodhrani* v. *Kishori Lal Roy*, (1887) 14 Cal 486,

... (1878) P. R. No. 63 of 1878.

may be admitted under this clause and s. 90, without proof of the execution of the original [1]

In a suit by the purchaser of a debt, the plaintiff stated that, in 1873, A executed a bond in favour of B to secure the repayment of Rs. 1,000, and that he had purchased the interest of B at a sale in execution of a decree against him. The plaintiff now sued A upon the bond, making B a party At the trial, A denied the execution of the bond, and it was not produced by the plaintiff, who, having served B with notice to produce, tendered secondary evidence of its contents. B was not examined as a witness, and no evidence was given of the loss or destruction of the bond It was held that secondary evidence was not admissible [2] In a suit for a declaration that certain survey numbers were kept joint at a partition between the parties' ancestors in 1809, the plaintiff relied upon a certified copy of a partition deed passed between the parties in that year. The copy which was produced showed that the original document was produced in Court in a suit of 1823. It was held that the Court could rely on the certified copy as showing the terms of the partition, as there was no reason to doubt, owing to the lapse of time, that the certified copy retained on the file of the suit of 1823 was a correct copy of the original.[3]

Clause (d).—This clause covers things not easily moved, as in the case of things fixed in the ground or a building For example, notices painted on walls, tablets in buildings, tombstones, monuments; or marks on boundary trees

Clause (e).—This clause is intended to protect the originals of *public records from the danger to which they would be exposed* by constant production in evidence Secondary evidence is admissible in the case of public documents mentioned in s 74 What s 74 provides is that public records kept in British India of private documents are public documents, but private documents of which public records are kept are not in themselves public documents. A registered document, therefore, does not fall under either clause (*e*) or (*f*) The entry in the register book is a public document, but the original is a private document A certified copy of the original cannot be given in evidence

Public documents can only be proved by their production or by secondary evidence of the nature described in this clause; they cannot be proved by the oral evidence of a witness.[4]

Clause (f)—Certified copies are admissible as secondary evidence under this clause Sections 76-78 and 86 may be read along with it.

The last but one paragraph of this section provides "in case (*e*), or (*f*), a certified copy of the document but no other kind of

[1] *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno*, (1880) 5 Cal. 886

[2] *Womesh Chunder Ghose v. Shama Sundari Bai*, (1881) 7 Cal 98

[3] *Khoduba v Takkatsarg Narsirgji*. (1921) 46 Bom 32.

[4] *Gurga Ram v The Empress India*, (1902) P. R. No 5 of 1903.

secondary evidence, is admissible." This applies only to the case in which the public document is still in existence on the public record [1]. Where a case falls under clause (*a*) or clause (*c*) and also under clause (*f*) any secondary evidence might be received.[2]

Clause (g).—Where the fact to be proved is the general result of the examination of numerous documents and not the contents of each particular document and the documents are such as cannot be conveniently examined in Court, evidence may be given, under this section, as to the general result of the documents by a person, who has examined them and who is skilled in the examination of those documents, although they may be public documents within the meaning of ss. 65 and 74.[3]

Objection to reception of secondary evidence in appeal Court.—If a copy of a document is admitted in evidence in the first Court without any objection, no objection can be allowed to be taken in the Appeal Court as to its admissibility.[4] The object of the rule is obvious, for, if objection is taken, the party producing the copy can ask for an adjournment in order to get the original or else to give evidence justifying the admission of secondary evidence.

Where, in the Courts below, a plaintiff did not produce a document in his possession and secondary evidence of it was disallowed, but, when the case came on appeal, he did then produce the document and offer it for the inspection of the Court of Appeal and the Court refused to look at it but admitted secondary evidence of its contents, it was held that this course of proceeding was wrong and that to accept secondary evidence of the document in the plaintiff's custody without looking at the original was an extraordinary course.[5]

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by

[1] *Kalandan v Kunkunni*, (1882) 6 Mad. 80, 81.

[2] *In the matter of a collision between the "Ava" and the "Brenhilda,"* (1879) 5 Cal. 568, 573.

[3] *Sundar Kuar v. Chandreshwar Prasad Narain Singh*, (1907) 34 Cal. 293.

[4] *Kishori Lal v. Rakhal Das*, (1903) 31 Cal. 155; *Akbur Ali v. Bhyea Lal Jha*, (1880) 6 Cal. 666; *Bacharam Mundul v. Peary Mohun*, (1883) 9 Cal 813; *Narendra Narain Rai v. Bishun Chundra Das*, (1885) 12 Cal. 182; *Chimnaji v. Dinkar*, (1886) 11 Bom 320; *Thet She v. Maung Ba*, (1905) 3 L B. R. 49.

[5] *Kishori Lal v. Rakhal Das*, (1903) 31 Cal 155. See *K. S. Bonnerji v. Sitanath Das*, (1921) 24 Bom. L. R. 565, P. C.

law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1) when the document to be proved is itself a notice ;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4) when the adverse party or his agent has the original in Court ;

(5) when the adverse party or his agent has admitted the loss of the document ;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

COMMENT.

Under this section a notice must be given before secondary evidence can be received under s 65 (*a*). Notice to produce a document must be in writing. Order XXI, r. 15, of the Civil Procedure Code, prescribes the kind of notice to produce a document.

Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby to secure the best evidence of its contents

The proviso to this section enumerates six cases in which a notice shall not be required to be given to the party in whose possession or power the document is in order to render secondary evidence admissible.

The procedure for the production of documents in criminal cases is laid down in ss 94-98 of the Criminal Procedure Code.

Section 175 of the Indian Penal Code punishes the person who omits to produce a document required by a public servant.

Where oral evidence was given to prove the contents of a letter, which was neither produced nor called for, but no objection was raised to the giving of the evidence, it was held that this was secondary evidence of the contents of a document, and could not be given without satisfying the conditions of s. 65. This section renders it legally inadmissible, although no objection was rai to the giving of it.[1]

1 *Kameshwar Pershad* v. *Amanutulla*, (1898) 26 Cal. 53

Proof of signature and handwriting of person alleged to have signed or written document produced

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

COMMENT.

This section merely requires proof of signature and handwriting of the person alleged to have signed or written the document produced. It does not require the subscribing witnesses or the writer of a document to be produced.[1]

As to the method of proof see ss 47 and 73.

Besides the question which arises as to the contents of a document (see ss. 61-66), there is always the question when the document is used in evidence,—Is it what it purports to be? In other words, is it genuine? The evidence upon this point is dealt with in ss. 67-73. The nature of the evidence will depend to a large extent on the nature of the document. If it is a mere memorandum, such as the entry in a diary mentioned in s. 32 (*b*), it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a letter it must be shown who wrote it, or at any rate who signed it, for a signature to a document turns the whole document into a statement by the person who signs it. If it is an agreement it must be shown who executed it.[2]

Execution of a document.—Execution means signing, sealing and delivery of a document. The term may be defined as formal completion of a deed. It is the last act or series of acts which completes it.[3]

Mere registration of a document is not in itself sufficient proof of its execution.[4]

CASE.

A deed of conveyance was tendered in evidence which purported to bear the mark of G, as vendor, and which was duly attested by four witnesses. G, however, denied that she had ever executed the deed; and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. It was held that the deed was admissible in evidence, its execution by G being sufficiently proved.

1 *Abdool Ali* v. *Abdoor Ruhman*, (1874) 21 W. R. 429.
2 Markby, 60.
3 *Bhawanji Harbhum* v. *Devji Punja*, (1894) 19 Bom 635.
4 *Salimatul-Fatima* v. *Koylashpoti Narain Singh*, (1890) 17 Cal. 903.
5 *Abdulla Paru* v. *Gannibai*, (1887) 11 Bom. 690.

68. If a document is required by law to be attested,[1] it shall not be used as evidence until one attesting witness at least has been called[2] for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Proof of execution of document required by law to be attested.

COMMENT.

This section applies to cases where an instrument required by law to be attested bears the necessary attestation. What the section prohibits is a proof of execution of a document otherwise than by the evidence of an attesting witness if available.[1] The fact that, when called, the attesting witness will prove hostile, does not excuse the party producing the document from this duty.[2]

Where one of the witnesses who have attested a mortgage bond is available, the execution of such bond cannot, under this section, be proved otherwise than by the evidence of such witness, even when the object of proving such execution has reference only to a personal covenant to pay, which is severable from the security created by the bond.[3]

1. '*Attested.*'—*Where an instrument is required to be attested*, the meaning is that the witness shall be present at its execution and shall testify that it has been executed by the proper person. To attest an instrument is not merely to subscribe one's name to it, as having been present at its execution, but includes also essentially, the presence, in fact, at its execution, of some disinterested person capable of giving evidence as to what took place. To attest, therefore, is to bear witness to a fact.[4] An attesting witness is a witness who has seen the deed executed and who signs it as a witness.[5] According to the Allahabad and the Patna High Courts the scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence,[6] but the Madras[7] and the Calcutta[8] High Courts have held to the contrary. A document cannot be attested by a party to it. An attesting witness is required

1 *Veerappa Kavundan* v. *Ramasami Kavundan*, (1907) 30 Mad. 251; *Ram Gopal* v. *Aipna Kunwar*, (1922) 44 All. 495.

2 *Tula Singh* v. *Gopal Singh*, (1916) 1 P. L. J. 360.

3 *Veerappa Kavundan* v. *Ramasami Kavundan*, (1907) 30 Mad. 251.

4 *Sasi Bhusan Pal* v. *Chandra Peshkar*, (1906) 33 Cal. 861, 864.

5 *Ranu Shitji* v. *Laxmanrao*, (1908) 10 Bom. L. R. 943, 947.

6 *Badri Prasad* v. *Abdul Karim*, (1913) 35 All. 254; *Ram Bahadur Singh* v. *Ajodhya Singh*, (1916) 20 C. W. N. 699.

7 *Paramasiva Udayan* v. *Krishna Padayachi*, (1917) 41 Mad. 535.

8 *Raj Narain Ghose* v. *Abdur Rahim*, (1901) 5 C. W. N. 454; *Dinamoyee Debi* v. *Bon Behary Kupur*, (1902) 7 C. W. N. 160; *Jagannath Khan* v. *Bajrang Das*, (1920) 48 Cal. 61.

to be called, not because proof by him is the best evidence, but because he is a witness appointed or agreed upon by the parties to speak to the circumstances of its execution.[1] An 'attesting witness' in this section has the same meaning as an 'attesting witness' in s. 59 of the Transfer of Property Act.[2]

The direct evidence of the attestor will be "primary evidence." If there is no attesting witness alive, then the document must be proved in the manner provided by ss. 47 and 73.

2. **'Called.'**—This expression means tendered for the purpose of giving evidence.[3]

Documents requiring attestation.—(1) Wills made by persons other than Hindus, Mahomedans, or Buddhists (ss. 50 and 331 of the Indian Succession Act); (2) wills made by Hindus, Jains, Sikhs and Buddhists (Hindu Wills Act, s. 2); (3) a mortgage, the principal money secured by which is Rs. 100 or upwards (Transfer of Property Act, s. 59); (4) a gift of immovable property (Transfer of Property Act, s. 132).

CASES.

Mortgage-deeds.—A deed of mortgage securing Rs. 100 or upwards requires two attesting witnesses. In a suit on a mortgage bond, the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of this section in order to prove the execution of the document as against other parties in the suit who do not admit such execution. Such a document must be proved as against them in accordance with the [illegible]

present who saw the mortgagor sign, but it was not proved to the contrary that there was not another attesting witness. It was held that the mortgage was sufficiently proved according to the requirements of this section and s. 69[5] A mortgage deed, on the face of it, appeared to be attested by a large number of witnesses. In a suit upon the bond the mortgagee called one attesting witness who proved that he saw the mortgagor sign the mortgage and that he himself signed his name as an attesting witness. The other witnesses were not called, nor did the witness who was called say that any other attesting witness was present, nor was he asked the question by either side. It was held that in the absence of any rebutting

[1] *Geralopulo* v. *Wieler*, (1851) 10 C B. 690, 696.

[2] *Jagannath Khan* v. *Bajrang Das*, (1920) 48 Cal. 61.

[3] *Moti Chand* v. *Lalta Prasad*, (1917) 40 All. 256

[4] *Satish Chandra Mitra* v. *Jogendranath Mahalanabis*, (1916) 44 Cal. 345.

[5] *Ram Dei* v. *Munna Lal*, (1916) 39 All. 109

evidence, the mortgage deed must be considered to be sufficiently proved.[1]

Where a mortgage deed, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law, it was held that the earlier docu- [illegible] explaining and amplify- [illegible] at a correct conclusion [illegible] which the parties had entered.[2]

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person

Proof where no attesting witness found

COMMENT.

If the attesting [illegible] tion of the Court or [illegible] document purports [illegible] of Great Britain and Ireland, two things must be proved ·

(1) the signature of one attesting witness, and
(2) the signature of the executant

CASES.

On execution of a deed of mortgage the names of the two out of the four attesting witnesses were written by the scribe, who also signed the document himself, it was held that, it being necessary to prove the deed of mortgage after the death of all attesting witnesses and the scribe, it was sufficient to prove the handwriting of the scribe.[3]

Where the executant of, and all the marginal witnesses to, a mortgage deed were dead, it was held that the mortgage deed was sufficiently proved by evidence that the signature of the mortgagor was in his handwriting and that the signatures of two of the marginal witnesses were in their handwriting[4]

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document

[1] *Shib Dayal v Sheo Ghulam*, (1916) 39 All 241
[2] *Moti Chand v Lalta Prasad*, (1917) 40 All 256
[3] [illegible]
[4] [illegible]

COMMENT.

This section serves as a proviso to s. 68.

The effect of this section is to make the admission of the executant a sufficient proof of the execution of a document as against the executant himself[1] even though it may be a document attestation of which is required by law.[2] The document is not for that reason binding on other persons. Where, therefore, in a suit on a mortgage bond against the executant and transferees from him the former admitted execution, it was held that the plaintiff was not entitled to any relief against the transferees unless, by reason of an admission of attestation made by them, s. 58 applied to the case, or the plaintiff was otherwise able to prove proper attestation of the bond.[3]

This section operates only where the person relying on a document has not given any evidence at all of due execution of the document by the executant but relies on an admission of execution by the latter. So that if a mortgagor admits execution of the document in the written statement, it is wholly unnecessary for the mortgagee to adduce any evidence as to execution of the document. But, if the mortgagee produces evidence of execution and that evidence discloses that the document was not properly attested, the matter stands on an entirely different footing.[4]

The admission here spoken of relates only to the execution. [illegible]

[illegible] word 'admission' relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. In other words, it has no relation to any admission of execution made before an attesting witness without reference to any suit or proceeding[5] But the Patna High Court has laid down that an admission under this section is admissible in evidence even though it be an admission not made in the course of legal proceedings pending before a Court of Justice, but which may be an admission made antecedent to the institution of legal proceedings.[6]

CASES.

[illegible] y three [illegible] ted by [illegible] a suit

1 *Jagannath* v. *Ravji*, (1922) 24 Bom L R 1296 [illegible]

[illegible]

4 *Musammat Hira Bibi* v. *Ramdhan Lal*, (1921) 6 P. L J. 465.

5 *Abdul Karim* v. *Salimun*, (1899) 27 Cal. 190; *Raj Mangal Misir* v. *Mathura Dubain*, (1915) 38 All. 1. See *Asharfi Lal* v. *Musammat Nannhi*, (1921) 44 All. 127.

6 *Nageshwar Prasad* v *Bachu Singh*, (1919) 4 P L. J. 511, doubted in *Musammat Hira Bibi* v. *Ramdhan Lal*, (1921) 6 P. L. J. 465.

for sale thereon, all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufructuary mortgage mentioned above It was held that, having regard to ss 69 and 70, this evidence was not sufficient to prove the mortgage in suit [1] Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document attestation of which is required by law.[2]

Proof when attesting witness denies the execution

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

COMMENT.

An 'attesting witness' is a person who sees a document executed, and signs the document as a witness [3]

Where an attesting witness has denied all knowledge of the matter, the case stands as if there was no attesting witness, and the execution of the document may be proved by other independent evidence This section only operates if the attesting witness denies or does not recollect the execution of the document Under this section execution of a document includes attestation [4]

Proof of document not required by law to be attested

72. An attested document not required by law to be attested may be proved as if it was unattested.

COMMENT.

Where the law does not require attestation for the validity of a document, it may be proved by admission or otherwise, as though no attesting witnesses existed.

1 *Gobardhan Das v Hori Lal*, (1913) 35 All 304

2 *Asharfi Lal v Musammat Naurhi*, (1921) 44 All 127 See *Jagannath v Ravji*, (1922) 24 Bom L R 1296, 47 Bom 137

3 *Musammat Hira Bibi v. Ramdhar Lal*, (1921) 6 P L J 465

4 *Lakshmar Sahu v. Gokul Makarana*, (1921) 1 Pat. 154.

COMMENT.

This section serves as a proviso to s. 68.

The effect of this section is to make the admission of the executant a sufficient proof of the execution of a document as against the executant himself[1] even though it may be a document attestation of which is required by law.[2] The document is not for that reason binding on other persons. Where, therefore, in a suit on a mortgage bond against the executant and transferees from him the former admitted execution, it was held that the plaintiff was not entitled to any relief against the transferees unless, by reason of an admission of attestation made by them, s. 58 applied to the case, or the plaintiff was otherwise able to prove proper attestation of the bond.[3]

This section operates only where the person relying on a document has not given any evidence at all of due execution of the document by the executant but relies on an admission of execution by the latter. So that if a mortgagor admits execution of the document in the written statement, it is wholly unnecessary for the mortgagee to adduce any evidence as to execution of the document. But, if the mortgagee produces evidence of execution and that evidence discloses that the document was not properly attested, the matter stands on an entirely different footing.[4]

The admission here spoken of relates only to the execution. It must be distinguished from the admissions mentioned in ss. 22 and 65 (*b*) which relate to the contents of a document.

The Calcutta and the Allahabad High Courts have held that the word 'admission' relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. In other words, it has no rela-

[illegible]

admissible *in evidence even though it be an admission not made in* the course of legal proceedings pending before a Court of Justice, but which may be an admission made antecedent to the institution of legal proceedings.[6]

CASES.

[illegible]

1 *Jagannath* v *Ravji*, (1922) 24 Bom L R 1296

2 *Asharfi Lal* v. *Musammat Nanuhi*, (1921) 44 All 127.

3 *Arjun Sahu* v. *Kelai Rath*, (1922) 2 Pat 317.

4 *Musammat Hira Bibi* v. *Ramdhan Lal*, (1921) 6 P. L J. 465.

5 *Abdul Karim* v. *Salimun*, (1899) 27 Cal 190; *Raj Mangal Misir* v. *Mathura Dubain*, (1915) 38 All 1. [illegible]

[illegible] *Lal*, (1921) 6 P. L. J. 465.

the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufructuary mortgage mentioned above. It was held that, having regard to ss. 69 and 70, this evidence was not sufficient to prove the mortgage in suit.[1] Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document attestation of which is required by law.[2]

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

COMMENT.

An 'attesting witness' is a person who sees a document executed, and signs the document as a witness.[3]

Where an attesting witness has denied all knowledge of the matter, the case stands as if there was no attesting witness, and the execution of the document may be proved by other independent evidence. This section only operates if the attesting witness denies or does not recollect the execution of the document. Under this section execution of a document includes attestation.[4]

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

COMMENT.

Where the law does not require attestation for the validity of a document, it may be proved by admission or otherwise, as though no attesting witnesses existed.

[1] *Gobardhan Das v Hori Lal*, (1913) 35 All 304.

[2] *Asharfi Lal v Musammat Naurhi*, (1921) 44 All 127. See *Jagannath v Ravji*, (1922) 24 Bom L R 1296, 47 Bom 137.

[3] *Musammat Hira Bibi v. Ramdhan Lal*, (1921) 6 P. L. J. 465.

[4] *Lakshwar Sahu v. Gokhul Maharana*, (1921) 1 Pat. 154.

Comparison of signature, writing or seal with others admitted or proved.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made,[1] any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger-impressions.

COMMENT.

This section provides for a case where no witnesses are called to prove the signature, writing or seal of a person and the comparison has to be made by the Court or by a witness called for that purpose.

Handwriting can be proved in the following ways:—

(1) By proof of signature and handwriting of the person alleged to have signed or written the document (s. 67):

(2) By the opinions of experts who can compare handwritings (s. 46):

(3) By a witness who is acquainted with the handwriting of a person by whom it is supposed to be written and signed (s. 47):

(4) By comparison of signature, writing or seal with other admitted or proved (s. 73).

1. 'By whom it purports to have been written or made.'— According to the Bombay High Court this expression means by whom it is alleged to have been written or made.[1] The Calcutta High Court has construed it to mean that the writing which is in dispute must itself in terms express or indicate that it was written by the person to whom the writing is attributed. The Court observed that the section "does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made....shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard....must *purport* to have been written by the same person, that is to say, the writing itself must

[1] *Emperor* v *Ganpat Balkrishna*, (1912) 14 Bom. L. R. 310.

state or indicate that it was written by that person....A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived [illegible]s."[1]

[illegible], writing is [illegible] lar person, then the case for the prosecution must be taken to be that having regard to the admitted documents, and the comparison between them and the disputed writing, the prosecution alleges that the disputed document purports to have been written or made by the accused.[2]

Under clause 3 of the section a Court has power to direct an accused person, present in Court, to make his finger impression for the purpose described in that section.[3]

PUBLIC DOCUMENTS.

Public documents

74. The following documents are public documents :—

(1) documents forming the acts or records of the acts[1]—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country ;

(2) public records kept in British India of private documents.[2]

COMMENT.

Documents are divided into two categories : public and private. This section states what comes in the category of public documents. Section 75 states that all other documents are private.

Certain modes of proof are prescribed in regard to public documents as distinguished from private documents.

"There are several exceptions to the rule which requires primary evidence to be given....The most important and conspicuous exception, however, is with respect to the proof of records, and other public documents of general concernment ; the objection to producing which rests on the ground of *moral* not physical inconvenience. They are, comparatively speaking, liable to corruption, altera-

[1] *Barindra Kumar* v *Emperor*, (1923) 37 Cal 467, 502 See *Sarojini Dasi* v *Hari Das Ghose*, (1921) 49 Cal 235.

[2] *Emperor* v *Ganpat Balkrishna*, (191[illegible]) 14 Bom L R 310.

[3] *King-Emperor* v *Tun Hlaing*, (1923) 1 Rang. 759, F. B

tion, or misrepresentation,—the whole community being interested in their preservation, and, in most instances, entitled to inspect them; while private writings, on the contrary, are the objects of interest but to few, whose property they are, and the inspection of them can only be obtained, if at all, by application to a Court of justice The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents

other reasons the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings."[1]

1. 'Documents forming the acts, or records of the acts.' —The word 'acts' in the phrase 'documents forming the acts or records of the acts' is used in one and the same sense The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document. The kind of acts which this section has in view is indicated by s. 78. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not result in action There may be no publicity about them. There is a substantial distinction, between such measures and the specific act in which they may result It is to the latter only that this section is intended to refer. It has, therefore, been held that reports made by a police officer in compliance with ss. 157 and 168 of the Criminal Procedure Code are not public documents within the meaning of this section, and consequently an accused person is not entitled, before trial, to have

tive official is not a public document.[4]

[1] Best, 12th Edn, ss 484-485, pp 407-409

[2] *Queen-Empress* v. *Arumugam*, (1897) 20 Mad. 189, 197, F. B.

2. **'Public records kept in British India of private documents.'** —This clause refers to public records of original wills and of registered documents.

Private documents

75. All other documents are private.

Certified copies of public documents

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

COMMENT.

This section provides the means of proof of public documents

Debt Office in the Bank of the meaning of s 74; and, under this section, any person having an interest in the document is entitled to inspect the same and obtain certified copies thereof [1]

Proof of documents by production of certified copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents

78. The following public documents may be proved as follows:—

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

[1] *Chandi Charan Dhar v. Boistab Charan Dhar,* (1903) 31 Cal. 284.

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3) proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer:

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor General of India in Council:

(5) the proceedings of a municipal body in British India,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6) public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

COMMENT.

This section specifies the various ways in which the contents of a public document can be proved.

The word 'may' is used only as denoting a mode of proof other than the ordinary one, namely, the production of the original. For, when the original is a public document within the meaning of

s. 74, a certified copy of the document, but no other kind of secondary evidence, is admissible.

This section does not appear to have the effect of absolving the parties from any rules governing the proof of facts on which they desire to rely. It is to be observed that the section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court liberty to resort for its aid to appropriate books or documents of reference on matters of public history [1] The proceedings of Parliament may be proved under cl. 2 by the journals of the House of Commons or by copies purporting to be printed by order of the Government.[2]

The Calcutta High Court has held that a Court is not bound to have recourse exclusively to the mode of proof in respect of published documents set out in this section This is a permissive and not an exclusive section [3] On a point of limitation, the version contained in the published Acts and not that contained in the Gazette was adopted by it [4] The Lahore High Court, on the other hand, has laid down that the text published in the Gazette must be taken to be the authorised text of the Limitation Act under cl. (2) of this section.[5]

Burmese seal.—The mere presence on a document of the impression of a seal, such as was in use by the High Court of the former Burmese Government, is no sufficient proof of the correctness of the document as a copy, of the existence of an original, or of the genuineness of the transaction to which it purports to testify. Such evidence can be manufactured without any great difficulty, and the Courts must be on their guard against its acceptance unless under proper tests and safeguards.[6]

PRESUMPTION AS TO DOCUMENTS.

Presumption as to genuineness of certified copies

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in British India, or by any *officer in any Native State in alliance with Her Majesty,* who is duly authorized thereto by the Governor General in Council, to be genuine :

1 "*The Englishman,*" *Ltd* v *Lajpat Rai*, (1910) 37 Cal 760

2 *Ibid.*

3 *Seodoyal Khemka* v. *Joharmull Manmull*, (1923) 50 Cal 549, 560

4 *Ibid.*

5 *Gobind Das* v *Rup K*[illegible] (1923) 4 Lah 367.

6 *Ma Mae Zet* v. *Maung* (1897-1901) 2 U. B. R. 404.

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3) proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer:

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor General of India in Council:

(5) the proceedings of a municipal body in British India,—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6) public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

COMMENT.

This section specifies the various ways in which the contents of a public document can be proved

The word 'may' is used only as denoting a mode of proof other than the ordinary one, namely, the production of the original. For, when the original is a public document within the meaning of

and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

COMMENT.

The presumptions to be raised under this section are considerably wider than those under s. 79. They embrace not only the genuineness of the document, but that it was duly taken and given under the circumstances recorded in the document. The case of copies of judicial depositions stands in a very different position from a species of evidence often tendered, that of official copies of petitions, etc., made to Courts and especially to revenue authorities. When a deposition is taken in open Court or a confession is taken [illegible] publicity and solemnity, which

that all was fairly done to raise a satisfactory *prima facie* presumption. Prisoners who have confessed are constantly seeking to escape the consequences of their acts by declaring on their trial that their statements were extorted from them, witnesses confronted by their former depositions swear that they were never explained to them before signature, or that what they said has not been correctly taken down The presumptions under this section are not conclusive, they may be rebutted.[1]

This section does not render admissible any particular kind of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, this section does not operate to render it admissible. The section merely gives legal sanction to the maxim "*Omnia præsumuntur rite esse acta*" with regard to documents taken in the course of a judicial proceeding.[2] Where, for instance, a confession is reduced to writing by a Magistrate in accordance with the provisions of the Criminal Procedure Code, the record is admissible in evidence, without further proof.[3]

'Taken in accordance with law, and purporting to be signed by any Judge or Magistrate, etc.'—If particular provisions of law

1 Norton, 261-62.

2 *Queen-Empress* v. *Viran*, (1886) 9 Mad. 224, 227. See *Hashim* v. *The Empress*, (1900) P. R. No. 9 of 1900 (Cr.).

3 *Khen an* v. *The Crown*, (1924) 6 Lah. 58.

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

COMMENT.

This section proceeds upon the maxim *omnia præsumuntur rite esse acta* (all acts are presumed to be rightly done). In fact all the following sections down to s. 90 inclusive, are illustrations of, and founded upon, this principle. But though the Courts are directed to draw a presumption in favour of official certificates, it is not a conclusive presumption, but rebuttable. It is but a *prima facie* presumption, and if the certificate, etc., be not correct, its correctness may be shown. On the same maxim stands the last clause of this section. It is very old law, that where a person acts in an [illegible] that he was duly appointed.[1] [illegible] be a certified copy of a record [illegible] presumed, under this section, to be an accurate copy of the record of evidence. This presumption is liable to be rebutted. This section imperatively directs the Court to raise the presumption. The terms of s. 114 are only permissive. The words ' shall presume ' indicate that if no other evidence is given the Court is bound to find that the facts mentioned in the section exist.

Clause 2.—Where a letter purporting to be issued from the [illegible] had ordered or authorised a prosecution under s. 196 of the Criminal Procedure Code. The presumption under this section would have arisen if the letter had been signed by the Chief Secretary himself.[2]

Presumption as to documents produced as record of evidence

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding[1] or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law,

[1] Norton, 260-61.
[2] *Ozullah* v. *Beni Madhab Chowdhuri*, (1922) 50 Cal. 135.

to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

COMMENT.

As to the meaning of the expression "proper custody" see the explanation to s. 90, *infra*.

As to the relevancy of statements in Gazettes, see s 37. The second part of this section includes most of the documents which contain matters referred to in s. 35 and which are declared to be public documents by s. 74.

Presumption as to document admissible in England without proof of seal or signature

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

COMMENT.

This section enables the Courts in British India to recognize presumptions [illegible] which are recognized in [illegible] it proof of the seal or sig[illegible] person by *whom they purport to have been signed, are admissible in England*, will be admissible in British Courts in India.

Presumption as to maps or plans made by authority of Government.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made, for the purposes of any cause must be proved to be accurate.

COMMENT.

The presumption as to accuracy is limited only to maps or plans made under the authority of Government [1] In all other cases proof of accuracy is needed.

The presumption in regard to the accuracy of a map made under the authority of Government is in no way affected by the fact that such map has been superseded by a later survey map made under the same authority, and by an order of the Board of Revenue.[2]

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong; but, in the absence of evidence to the contrary, they may be judicially received in evidence as correct when made.[3]

Presumption as to collections of laws and reports of decisions

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country.

COMMENT.

This section should be read along with s. 38. It dispenses with the proof of the genuineness of authorized books of any country containing laws and reports of decisions of Courts. Section 57 authorizes the Courts to take judicial notice of the existence of all laws and statutes in British India and in the United Kingdom. Section 74 recognizes statutory records to be public records. Section 78 lays down the method of proving the statutes passed by the Legislature.

Presumption as to powers-of-attorney

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

1 *Rahmat-Ulla Khan v Secretary of State for India*, (1913) P. R No 63 of 1913.

2 *Joggessur Singh v. Byount Nath Dutt*, (1880) 5 Cal. 822.

3 *Jagadindra Nath Roy v. Secretary of State for India*, (1902) 30 Cal. 291, P. C.

COMMENT.

The words "shall presume" indicate that the section is mandatory.

This section does not exclude other legal modes of proving the execution of a power-of-attorney.[1]

CASE.

On an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power-of-attorney was not executed in the presence of a notary public; but, with regard to the execution by each of the executors, one of the attesting witnesses had made a declaration before a notary public to the effect that he witnessed the execution of the power-of-attorney by one of the executors, and that the signature of the other attesting witness was the proper [illegible] each declaration was [illegible] It was held that [illegible]

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to certified copies of foreign judicial records.

An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause (40), of the General Clauses Act, 1897, shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

COMMENT.

This section lays down that if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. It, however, *does not exclude other proof*, for, under ss. 65 and 66, secondary evidence may be given of public documents, without notice to the adverse party, when the person

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1 *In re Slaten*, (1898) 21 Mad 402.   2 *Ibid.*

in possession of the documents is out of the reach of, or not subject to, the process of the Court.[1]

This section contains an instance of documents which s. 65, cl. (*f*), seems to refer to.

The provisions of this section are imperative and must be complied with. In the absence of the certificate referred to in this section, the statements of witnesses taken in a Court of law in the Jaipur State are not admissible in evidence although they were forwarded by the Resident in due course.[2]

Presumption as to books, maps and charts

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

COMMENT.

This section enables the Court to presume that any book to which it may refer for information on matters of public or general interest or any published chart or map, was written and published by the person, and at the time and place by whom or at which it purports to have been written or published. See ss. 36 and 83.

Presumption as to telegraphic messages.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

COMMENT.

This section allows the Court to treat telegraphic messages received, as if they were the originals sent, with the exception, that a presumption is not to be made as to the persons[3] by whom they were delivered for transmission and, unless the non-production of the originals is accounted for, secondary evidence of their contents is inadmissible.

This section enables the Court to accept the hearsay statement as evidence of the identity of the message delivered with that handed in.

1 *Haranund Roy Chellangia* v. *Ram Gopal Chellangia*, (1899) 2 Bom. L. R. 562, 27 Cal. 639, P. C.

2 *Murli Das* v. *Achut Das*, (1923) 5 Lah. 105.

3 *Emperor* v. *Abdul* 17 Bom L. R.

Presumption as to due execution, etc., of documents not produced

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

COMMENT.

When a document is called for and not produced after proper notice so to do, the Court shall presume that it was duly attested, stamped and executed in the manner prescribed by law. The section refers only to stamp, execution and attestation on documents. It is restricted to cases where notice to produce a document is given to a party. Where a document is shown to have remained unstamped for some time after its execution, the party who relied on it must prove it to have been duly stamped.

Presumption as to documents thirty years old

90. Where any document, purporting or proved to be thirty years old,[1] is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

Illustrations

(*a*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his titles to it. The custody is proper.

(*b*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c*) A, a connection of B, produces deeds relating to lands in B's possessi[on] which were deposited with him by B for safe custody. The custody is prop[er].

COMMENT.

The object of this section is not to make it too difficult for persons relying upon ancient documents to utilize those documents in proving their cases. It is intended to do away with the insuper-

to be more than thirty years old, if it be produced from what the Court considers to be proper custody, it may be presumed that it was executed and attested by the parties whose signatures it bears.[1] If a document is more than thirty years old no proof of it need be given, if it has been so acted upon or brought from such a place as to offer a reasonable presumption that it was honestly and fairly obtained and preserved for use and is free from suspicion of dishonesty.[2]

No legal presumption can arise as to the genuineness of a document more than thirty years old, merely upon proof that it was produced from the records of a Court in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that Court had cognizance, and which had come under the cognizance of such Court.[3]

The presumption allowed by this section is not a presumption which the Court is bound to make, and the Court may require the document to be proved in the ordinary manner.[4] It is in the discretion of a Court whether it will raise the presumption in favour of a document for which this section provides, but this discretion is *not to be exercised arbitrarily; it must be governed by principles*, which are consonant with law and justice. And while on the one hand great care is requisite in applying the presumption, on the other hand it is clear that very great injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons. "Because a document purports to be an ancient document and to come from proper custody, it
assumed.
ness, and t
due execution, there is an end of it. But if no such grounds exist, and it satisfies the conditions prescribed by s. 90 of the Indian Evidence Act, then proof of execution is dispensed with, and it is to be dealt with on the same footing as any other genuine instrument.

1 *Ekcowree Singh Roy* v. *Kylash Chunder Mookerjee*, (1873) 21 W. R 45.

2 *Hari Dhangar* v. *Biru Dasru*, (1868) 5 B. H. C. (A. C. J.) 135.

3 *Gudadhur Paul Choudhry* v. *Bhyrub Chunder Bhuttacharji*, (1880) 5 Cal. 918.

4 *Musammat Shafiq-un-nissa* v. *Raja Shaban Ali Khan*, (1904) 6 Bom. L. R. 750, 26 All. 581, P. C.; *Amir* v. *Nur Muhammad*, (1902) P. R. No. 82 of 1902.

If the authority or the title of the executant, for example, be not questioned, then effect is to be given to it as though he had the requisite authority or title If either be questioned, then of course the person on whom the burden of proof lies must adduce evidence to satisfy the Court on the point, or he fails. When the genuineness of a document purporting to be an ancient document is put in issue it appears to have been sometimes thought that any presumption in its favour is thereby excluded. But this would be to deprive the party producing it of the benefit of the presumption precisely in the circumstances in which he most stands in need of its aid And there seems to be no difference in principle between cases in which due execution is traversed without more—those, that is, in which the party [illegible] it to proof of it, and those in which it [illegible] is a forgery, except that, in the latte [illegible] ourt may be aroused by the nature of the plea But in the one case, as in the other, the presumption merely takes the place of the evidence which would, where a modern document is concerned, be necessary for the purpose of proving due execution The Court may decline to raise the [illegible] ocument must [illegible] But where [illegible] st be met and rebutted in the same way as direct evidence of execution in the case of a modern document The proper rule is, well stated by Mr. Taylor He says (p 587, 8th Edn)—'An ancient deed, which has nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead, and if found in proper custody and corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of the property therein mentioned, because this is the usual course of such transactions "[1] Before a Court is justified in making a presumption in favour of the genuineness of an ancient document it should be satisfied *aliunde* that there is good ground for accepting it as a true document [2] If there are circumstances in the case which throw great doubt on the genuineness of a document more than thirty years old, even if it is produced from proper custody, the Court may exercise its discretion by not admitting that document in evidence without former proof, and reject it when no such proof is given.[3]

[illegible] nt document depends [illegible] affairs necessarily, or [illegible]

[1] Per Hill, J, in *Govinda Hasta v. Protap Narain Mukhopadhya*, (1902) 29 Cal. 740, 747.

[2] *Jesa Lal v Mussammat Ganga Devi*, (1913) P. R. No. 81 of 1913.

[3] *Shafiq-un-nissa v. Shaban Ali Khan*, (1904) 26 All 581, 6 [illegible] L. R. 750, P.C. *Charitar Rai v. Bikari*, (1915) 3 P. L. J.

[4] *Hari Chintaman Dikshit* [illegible] *Lakshman*, (1886) 11 Bom, 8

1. **'Thirty years old.'**—The period of thirty years is to be reckoned not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness otherwise becomes the subject of proof.[1]

A document dated August 3, 1888, was produced in Court on December 19, 1917, and its genuineness was not called in question up to August 12, 1918, when the first Court gave its judgment. It was only when the case came up to the appellate Court that the defendants took the objection that the document had not been proved. The District Judge held that the period of thirty years should be reckoned from the date of his predecessor's order remanding the case. It was held that the period of thirty years laid down in this section should at all events not be reckoned from a date earlier than August 12, 1918, when the trial Court gave its decision and the due execution of the document could therefore be presumed.[2]

Secondary evidence of ancient documents.—The presumption allowed by this section may be applied where the original of a [illegible]

is proved to be a true copy a presumption may be made in favour of the genuineness of the original.[4]

In a suit to recover possession of land, the defendant relied principally on a document which was filed in the Munsiff's Court in support of his title. According to the evidence this document had been prepared with reference to a document of an earlier date. This earlier document was not produced, though it was admittedly [illegible]

although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, and inasmuch as the exhibit was a copy and not the original, the presumption which, under this section, may be made where a document over twenty years' old is produced, ought not to be made.[5]

1 *Minu Sirkar* v. *Rheodoy Nath Roy*, (1870) 5 Cal. L. R. 135.

2 *Ladha Singh* v. *Mst. Hukam Devi*, (1923) 4 Lah. 233.

3 *Ishri Prasad Singh* v. *Lalli Jas Kunwar*, (1900) 22 All. 294; *Dwarka Singh* v. *Ramanand Upadhia*, (1919) 41 All. 592; *Sawan Singh* v. *Karim Baksh*, (1910) P. R. No. 93 of 1910.

4 *Somayajulu* v. *Seethayya*, (1922) 46 Mad. 92, F. B.

5 *Appathura Pattar* v. *Gopala Panikkar*, (1901) 25 Mad. 674

Burma.—As to the presumption which a Court may make under this section, the power thereby given must be exercised with great discretion in a country where documents are written on such material as a palm leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures, so that the term "execution" is rather a convenient expression than a correct description of the actual proceeding.[1]

Explanation.—'Proper custody' means the custody of any person so connected with the deed as that his possession of it does not excite any suspicion of fraud.[2] It is not necessary that the document should be found in the best and the most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody, and not on the history of the continuance. Possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed notwithstanding a transfer of old, or creation of new, interests.[3]

As to what is 'proper custody,' Tindal, C. J., has said: "Documents found in a place in which, and under the care of persons with whom (such) papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it, for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity: but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible appears from all the cases."[4]

CASES.

Where a *Kabuliyat* more than thirty years old purported to have been executed by a person as Am-mukhtar (attorney) for two

[1] *Ma Lon* v *Maung Myo*, (1892-96) 2 U B R. 350.
[2] *Doe dem Neale* v *Samples*, (1838) 8 Ad. & El. 151.
[3] *Tajudin* v *Govind*, (1902) 5 Bom. L. R. 144: 27 Bom. 452.
[4] *Bishop of Meath* v. *Marquess of Winchester*, (1836) 3 Bing. N. C. 183, 200.

ladies, it was held that under this section no doubt there should be a presumption that the document was executed by that person as Am-mukhtar, but it must be proved that he had authority to execute the document on behalf of the ladies.[1]

Proper custody.—Where a daughter professed to hold under a lease, more than thirty years old, in favour of her father, and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of the father's heirs, it was held that the daughter's custody of the lease was a natural and proper custody within the meaning of this section.[2]

A person, who had obtained possession of a document, which would naturally come into his possession, failed to restore it after his right to possess it had ceased, and the document was produced from his custody. It was held that his failure to do so did not make the custody improper within the meaning of this section.[3]

Where a will and an *anumati-patra* were deposited by the father of the executant, a few days after the latter's death, with the Collector, together with an application praying that the Court of Wards should take over the estate left by the deceased, and the two documents were produced from the Collector's office fifty-four years afterwards, and filed, it was held that they had been produced from proper custody within the meaning of this section, and that the Court was entitled to presume that they were genuine.[4]

1 *Ramani Kanta Ray* v *Bhimnandan Singh*, (1923) 50 Cal. 526

2 *Trailokia Nath Nundi* v *Shurno Chungoni*, (1885) 11 Cal. 539

3 *Shama Charan Nandi* v. *Abhiram Goswami*, (1906) 33 Cal. 511.

4 *Rajendra Prasad Bose* v. *Gopal Prasad Bose*, (1924) 4 Pat. 67.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other dispositon of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills admitted to probate in British India may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved

(*c*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d*) A contract, in writing, with B, for the delivery of indigo upon certain terms

The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo The evidence is admissible.

(*e*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

COMMENT.

This section and s. 92 define the cases in which documents are exclusive evidence of transactions which they embody. Sections 93-100 provide for the interpretation of documents by oral evidence

When a transaction has been reduced to writing either by agreement of the parties or by requirement of law, the writing becomes the exclusive memorial thereof, and no evidence shall be [illegible] the document itself or second- [illegible] h evidence is admissible. This [illegible] he *best evidence, of which the case in its nature is susceptible,* should always be presented. This rule does not demand that the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party.[1]

The section provides two things: (1) if the transaction has been reduced into writing, then the existence of this document excludes all other evidence of the transaction; (2) where any matter is required by law to be reduced into the form of a document, then the document itself must be put in evidence. The first provision refers to transactions voluntarily reduced to writing. The second refers to those cases in which any method is required by law to be reduced to the form of a document, *e.g.*, sale of immovable property of the value of one hundred rupees and upwards, mortgage for an amount exceeding one hundred rupees, a lease of immovable property for a

1 Taylor, 11th Edn., s. 391, p. 294. See *Entisham Ali* v. *Jamna Prasad*, (1921) 24 Bom. L. R. 675, where secondary evidence of a sale-deed was admitted.

year at least, a trust of immovable property, a gift of immovable property,[1] etc

If the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible, but if they intended only to reduce into writing a portion of the terms of the contract, then they are entitled to give parol evidence of the terms which they did not intend to reduce into writing.[2] Illustration (*b*) refers to the first part of the section.

Where a written contract has undergone subsequent alteration by agreement of the parties to it, the Court will look only to the final expression of the contract in construing it.[3]

The general rule laid down in this section is subject to the exceptions laid down in the following ss. 95 and 97. Where a sale-deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show [illegible]
actually sold and delivered [illegible]
numbers.[4] This section has n[illegible]
evidence of the matter reduc[illegible] [illegible] not
evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter.[5]

Under English law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners Such partners are liable to be sued on the contract, though no allusion [illegible]

Dying declaration.—A petition of complaint and the examination of the complainant on oath under s 200 of the Criminal Procedure Code are admissible as dying declarations under section 32, cl. (1), and are not, as such, matters required by law to be reduced

1 See *Chougatta* v. *Chatar Sing*, (1877) P R. No 18 of 1878, *Fatteh Singh* v *Mian Singh*, (1883) P R No. 131 of 1883

2 *Jumna Doss* v. *Srinath Roy*, (1886) 17 Cal 176 *n* See *Sangam Lal* v. *Mussammat Sikandar Jehan Begam*, *Kirpa Ram and Thakur Das*, (1889) P R. No. 183 of 1889. F B

3 *Maung Po Thet* v *S R M. M Arunachellum Chetty*, (1897-1901) 2 U B R 385

4 *Karuppa Goundan alias Thop*- [illegible]

5 [illegible] Ltd v Hassan Mamooji, (1920) 23 Bom L. R. 767.

to the form of a document within the meaning of this section so as to exclude parol evidence of their terms.[1]

Exception 1.—This exception is partly based on the maxim *omnia praesumuntur rite esse acta.* "It is a general principle, that a person's acting in a public capacity is *prima facie* evidence of his having been duly authorised so to do; and even though the office be one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production."[2]

"This presumption of the due appointment of public officers rests on three grounds: 1st, A principle of public policy. 2nd, In some degree on the ground that, in many cases not to make it would be to presume that the party acting had been guilty of a breach of the law. 3rd, In the case of public appointments, there are facilities for disproving the regularity of the appointment which do not exist in the case of the agents of private individuals."[3]

Exception 2.—Probate means a copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator.[4] Probate of a will is evidence of the contents of the will against all the parties interested thereunder Probate is secondary evidence, but it is made admissible by this section.

Explanation 1.—Illustration (*a*) to the section exemplifies this explanation. When parties negotiate at a distance by letters or telegrams, the entire mass of correspondence indicates the true nature of the agreement entered into by the parties.

Explanation 2.—Illustration (*c*) exemplifies the meaning of this explanation. See s. 62, Explanations 1 and 2. Bills of exchange and bills of lading have more originals than one.

Explanation 3.—Illustrations (*d*) and (*e*) exemplify this explanation. When the contents of any document are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But when a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. A receipt for sums paid in part liquidation of a bond hypothecating immovable property must be registered to render it admissible as evidence. Under illustration (*e*) to this section such payments

[1] *Gouridas Namasudra* v. *Emperor*, (1908) 36 Cal. 659

[2] Best, 12th Edn., s 356, pp. 313-314.

[3] *Ibid*, s. 358, p 315.

[4] The Indian Succession Act (X of 1865), s. 3.

may nevertheless be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence.[1]

In a suit, which was brought for the price of goods sold and delivered, the plaintiff swore to the fact of the sale and tendered in evidence a written admission of the defendant that the goods had been supplied to him The writing was rejected, as unstamped, and the suit was dismissed. It was held that the Judge should have allowed the plaintiff an opportunity of proving by oral testimony the delivery of the goods sold, and their value.[2] So, although where the contents of a marriage register are in issue, verbal evidence of those contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it [3]

Where a written document is defective as a valid and finally concluded agreement such defect may be supplied by the subsequent actings and conduct of the parties, as where subsequent acts of the parties themselves disclose a state of affairs consistent only with the existence of an agreement mutually recognised and acted upon as if the instrument were binding [4]

Suit on a promissory note inadmissible in evidence.—The rulings of the Indian High Courts on the question where money is lent to a person who passes a promissory note, but the note is inadmissible in evidence for want of sufficient stamp or for any other reason, may be classified in the two classes lucidly enunciated by Garth, C J, in *Sheikh Akbar* v. *Sheikh Khan*[5] in which the question was whether a copy of a lost promissory note, which was itself inadmissible as being insufficiently stamped, could be received in evidence The Court held that it could not be received in evidence Garth, C. J, said "When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person In such cases the bill or note is said to be taken by the creditor *on account of the debt*, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration ..But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B

[1] *Dalip Singh* v. *Durga Prasad*, (1877) 1 All 442, *Sukh Dial* v *Mani Ram*, (1914) P R. No 29 of 1915 *Sharaf Ali Khan* v *Jagandir Singh* (1916) P R No 98 of 1910

[2] *Binja Ram* v. *Rajmohun Roy* (1881) 8 Cal. 282

[3] *Balbhadar Prasad* v *The Maharajah of Betia*, (1887) 9 All 351 356

[4] *Maharani Janki Kuer* v *Brij Bhikhan Ojha* (1924) 3 Pat. 349

[5] (1881) 7 Cal 256, 259.

contracts by a promissory note to repay it with interest at six months date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money."[1] In a later case, however, the same High Court held in a suit brought on a *hatchitta* bearing an insufficient stamp and in which the defendant admitted the loan but pleaded payment, that the promissory note was not admissible in evidence but the plaintiff had a cause of action independently of it.[2]

The Bombay High Court approved of the principle stated in *Sheikh Akbar* v *Sheikh Khan*[3] in a case in which the plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for a consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. It was held that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp and that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence and the admission contained in the defendant's written

[illegible] money

[illegible] brought

[illegible] h there

is and can be a claim to recover the original loan, has been acknowledged.[5] Where there is an independent admission of a loan, the holder of a *hundi*, bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.[6]

The Madras High Court has held that where a suit is brought

[1] *Sheikh Akbar* v. *Sheikh Khan*, (1881) 7 Cal. 256, 259; *Radhakant* v *Abhoychurn*, (1882) 8 Cal. 721; *Bakhshi Ram Labhaya* v. *Kaka Ram*, (1895) P. R. No. 42 of 1895; *O'Gorman* v. *Mahtab Singh*, (1899) P. R. No 92 of 1898.

[2] *Pramatha Nath Sandal* v *Dwarka Nath Dey*, (1896) 23 Cal. 851, following *Golap Chand* v. *Thakurani Mohokoom*, (1878) 3 Cal. 314.

[3] (1881) 7 Cal. 256.

[4] *Damodar Jagannath* v. *Atmaram Babaji*, (1888) 12 Bom. 443

[5] *Chenbasapa* v. *Lakshman*, (1893) 18 Bom. 369.

[6] *Krishnaji* v. *Rajmal*, (1899) 24 Bom. 360

on a *hundi* which is inadmissible in evidence, being insufficiently stamped, the plaintiff cannot recover on it.[1] The terms of a contract to repay a loan of money with interest having been settled and the money paid, a promissory note specifying these terms was executed later in the day by defendant and given to the plaintiff. The promissory note was not stamped In a suit brought to recover the unpaid balance of the loan on an oral contract to pay, it was held that the plaintiff could not recover[2]

But where the plaintiff lent money to the defendants for the purchase of indigo and the defendants gave a promissory note for the amount, which was not admissible in evidence being insufficiently stamped, and the plaintiff sued, not on the note, but for money lent, it was held that the case fell within the first class of cases described in *Sheikh Akbar's case*, and that the plaintiff was entitled to a decree.[3] Similarly, the purchaser of the assets of a bank in liquidation, which assets included a debt due by defendants to the late bank and a promissory note given in respect of that debt, sued defendants on the promissory note as well as on the original debt in respect of which the note had been given The note had not been endorsed until after the bank had been wound up and had ceased to exist, and the endorsement had been held to be invalid It was held that the purchaser was entitled to sue for the original debt even though he was not entitled to sue on the promissory note.[4]

The Allahabad High Court following *Sheikh Akbar's case* has laid down that if a creditor has a cause of action for the recovery of money, for which his debtor has executed a promissory note, separate from and independent of the note, he can recover upon such cause, in case the note for any reason cannot be put in evidence Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed[5] Where a loan was already existing, and part of it had been repaid, and a promissory note was executed in favour of the creditor for the balance, it was held that the existence of the promissory note did not debar the creditor from resorting to his original consideration nor exclude evidence of the oral acknowledgment of the debt.[6] Similarly, where a promissory note was not the contract out of which the defendant's liability arose, but was merely a collateral security for the defendant's fulfilment of

[1] *Lalappa Rauthan* v *Mahommed Khasim*, (1881) 5 Mad 106

[2] *Pothi Reddi* v *Velayudasivan* (1886) 10 Mad 94

[3] *Krishnasami Pillai* v *Rangasami Chetti*, (1883) 7 Mad 112 The above-mentioned case in 10 Mad 94 cannot be easily reconciled with this

[4] *Ramachandra Rao* v *Venkataramara Ayyar*, (1890) 23 Mad 527.

[5] *Ram Sarup* v *Jasodha Kunwar*, (1911) 34 All 158, overruling *Parsotam Narain* v *Taley Singh*, (1903) 26 All. 178

[6] *Hira Lal* v *Daulatin*, (1881) 4 All. 135; *Banarsi Das* v. *Bhikhari* ... (1881) 3 All. 717.

his promise to pay the debt, it was held that the plaintiff was entitled to give evidence of the consideration, and to maintain the suit as for money lent, apart from the note altogether.[1]

The defendants borrowed money from the plaintiffs and in return therefor drew four *hundies* in their favour. As these *hundies* became due, the interest on the loan was paid and the *hundies* were renewed, the old *hundies* being on each occasion handed over to the defendants. Ultimately the plaintiffs sued on a set of renewed *hundies*, but it was found that these particular *hundies* were insufficiently stamped and could not be admitted in evidence. It was held that the plaintiffs were entitled to fall back upon the last preceding set of *hundies*, and, as these were in the possession of the defendants, to give secondary evidence of their contents.[2]

The Lahore High Court has held that where a negotiable instrument taken on account of pre-existing debt is inadmissible in evidence, the creditor may sue for the original consideration, but when the original cause of action is the instrument itself and does not exist independently of it, the plaintiff cannot sue except upon the instrument. Whether there is a cause of action independent of the instrument upon which independent evidence may be given, depends upon the question whether the plaintiff can allege any contract as the basis of his suit which is not the contract reduced to the form of a document. Where the money advanced a short time before the actual execution of the *hundi* was advanced on the security of the *hundi* and the agreement between the parties was that the loan should be made in consideration of the *hundi*, it was held that there was no cause of action independent of the *hundi*, and as the *hundi* was inadmissible in evidence as it was insufficiently stamped, and no secondary evidence could be given under this section, the plaintiff must fail.[3]

The Chief Court of Lower Burma has decided that where money is lent and at the same time a promissory note is given therefor, the creditor is not debarred from suing for the money lent as on the original contract of loan, if the promissory note cannot be proved.[4]

CASES.

Confession.—A confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of this section, and no evidence can be given of the terms of such a confession except the record, if any, made under s. 364 of the Code

[1] *Balbhadar Prasad* v. *The Maharajah of Betia*, (1887) 9 All. 351. See *Banarsi Prasad* v. *Fazal Ahmad*, (1905) 28 All. 298.

[2] *Jagan Prasad* v. *Indar Mal*, (1914) 36 All. 259.

[3] *Chanda Singh* v. *Amritsar Banking Co.*, (1921) 2 Lah 330.

[4] *Maung Kyi* v. *Ma Ma Gale*, (1919) 10 L. B. R. 54, F. B; *Nga Waik* v. *Nga Chel*, (1907-1909) 2 U. B R. (Evi.) 5. and *Bally Singh* v. *Bhugwan Dass Kalwar*, (1913) 7 L. B R. 101, dissented from.

of Criminal Procedure[1] Oral confession of his guilt made by an accused before a Magistrate is inadmissible in evidence.[2]

Deposition.—The omission to read over his deposition to the witness, in accordance with Order XVIII, rule 5, of the Civil Procedure Code, renders the same inadmissible in evidence against him on his subsequent trial for forgery, and oral evidence of its contents is excluded by this section.[3]

Admission of guilt.—The complainant in a petty criminal case before a bench of Honorary Magistrates, in the course of negotiations concerning a compromise, made a statement to the effect that he had paid a certain sum of money by way of an illegal gratification to the Peshkar of the Court. The Peshkar was at once called up and examined, by way of departmental inquiry and not on oath, and he admitted having received money from the complainant. The Honorary Magistrates reported the circumstances to the District Magistrate, who directed the prosecution of the Peshkar It was held that the statement made by the Peshkar to the Magistrates was not a statement which was required by law to be in writing and could be proved by the evidence of either of the Magistrates who had heard it.[4]

Unregistered document may only be looked into for a collateral purpose.—In a suit to recover possession of certain property as joint undivided property the defendant relied on an earlier unregistered partition deed to show that the property in dispute was not joint but separate The plaintiff contended that as the partition deed could not be looked at for want of registration the Court was prevented by this section from concluding that there was partition at any time which led to a separation in interest of members of the family It was held, setting aside the contention, that the partition deed was admissible in evidence as it was not intended to prove its terms but all that the Court had been concerned with was to find out whether particular properties claimed by the plaintiff to be joint family property were at the date of the suit joint or separate.[5] A document requiring registration but which is not registered may be admissible for a collateral purpose,[6] *e g*, to show the nature of a party's possession

Where a document, itself *legally* inadmissible in evidence, was subsequently referred to and partly incorporated in a second

1 *Emperor* v *Gulabu*, (1913) 35 All 260 See *Queen-Empress* v *Nga Thet*, (1900) 1 U B. R (1897-1901) 156, *Shwe Ko* v *King-Emperor* (1905) 3 L B R 128; *Crown* v *Mi Shwe Ke*, (1902) 1 L B R 268

2 *Emperor* v *Maruti Santu More*, (1919) 21 Bom. L R 1065, Hayward, J., expressed a contrary opinion in this case

3 *Emperor* v *Nabab Ali Sarkar*, (1923) 51 Cal 236

4 *Emperor* v *Haidar Raza* (1914) 36 All 222

5 *Chhotalal Aditram* v *Bai Mahakore* (1917) 19 Bom L. R. 322; *Maung Po Kin* v *Maung Shwe Bya*, (1923) 1 Rang 405.

6 *Maharani Jarki Kuer* v. *Brij Bhikham Ojha*, (1924) 3 Pat. 349.

document of similar import duly executed between the same parties and registered according to law, it was held that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered.[1]

Plaintiff claimed certain property by virtue of a partition. The terms of the partition were embodied in a deed; but, as the deed was neither stamped nor registered, it was not received in evidence by the trial Court. It was held that, although it might be open to the plaintiff to give oral evidence as to the mere fact that there had been a partition, he could not be allowed to go further and state what the terms of the partition were.[2]

When upon a mortgage by deposit of title deeds a document is drawn up constituting the bargain between the parties, the document is not admissible in evidence to prove the mortgage unless it is registered under the Indian Registration Act, and oral proof of the mortgage is inadmissible.[3]

Unstamped power-of-attorney.—Plaintiffs sued for possession of the mortgaged property under a deed of mortgage made some fourteen years before suit on behalf of the defendant by his duly authorized agent. The agent's power-of-attorney was not forthcoming and the document was apparently never duly stamped in this country. Defendant admitted giving a power-of-attorney to the agent, but did not think that it gave him the power to effect the mortgage on his behalf. It was held that the contents of a power-of-attorney, not produced and not duly stamped, could not be proved by production of a copy of it, on payment of penalties But that the fact that a written power-of-attorney was executed did not exclude evidence *aliunde* of the agent's authority.[4]

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property,[1] or any matter required by law to be reduced to the form of a document,[2] have been proved according to the last section,[3] no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest,[4] for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

[1] *Moti Chand* v. *Lalta Prasad*, (1917) 40 All 256.

[2] *Subramonian* v. *Lutchman*, (1922) 50 Cal. 338, 1 Rang 66, 25 Bom. L. R. 582, P. C.

[3] *Jai Ram Das* v. *Raj Narain*, (1922) 45 All. 21.

[4] *Nanak Chand* v. *Muhammad Afzal*, (1912) P. R. No 33 of 1913; *Raja of Bobbili* v. *Inuganti China*, (1899) 23 Mad. 49 P. C.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreemer [illegible] n precedent to the attachin[illegible] any such contract, grant or [illegible] be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London" The goods are shipped in a particular ship which is lost The fact that that particular ship was orally excepted from the policy cannot be proved.

(*b*) A agrees absolutely in writing to pay B Rs. 1,000 on the first March, 1873 The fact that, at the same time an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved.

(*c*) An estate called "the Rampur Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved

(*d*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved

(*e*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g*) A sells B a horse and verbally warrants him sound A gives B a paper in these words. "Bought of A a horse for Rs 500" B may prove the verbal warranty.

(*h*) A hires lodgings of B, and gives B a card on which is written—"Rooms, Rs 200 a month" A may prove a verbal agreement that these terms were to include partial board

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board A may not prove that board was included in the term verbally.

(*i*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(*j*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered

COMMENT.

As a general rule, when a transaction has been reduced into writing, either by requirement of law, or agreement of the parties, the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to independently prove the transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence.

The grounds of exclusion are: (1) that to admit inferior evidence when the law requires superior would be to repeal the law; and (2) that when the parties have deliberately put their intentions into writing, it must be assumed as between them-

selves that they intended the writing to form a full and binding statement of such intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.[1] All parol testimony of conversations held between the parties, or declarations made by either of them, whether before, or after, or at the time of the completion of the contract, will be rejected; because such evidence would tend to substitute a new and different contract for the one really agreed upon.

This section is supplementary to s. 91 and is, to some extent, implied in it. If the contract, grant or disposition has been reduced into writing, s. 91 says no evidence shall be given of it, except the document itself, and this rule would be in vain, unless, as is said in this section, it was also forbidden to contradict, vary, add to, or subtract from, its terms.[2]

Scope.—The section applies only where, upon the face of it, *the written instrument appears to contain the whole contract*.[3] If the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible, but if they intended only to reduce into writing a portion of the terms of the contract, then they are entitled to give parol evidence of the terms which they did not intend to reduce into writing.[4]

Applicability of the section when criminal proceedings are taken on a written contract.—Where a party to a written contract institutes a criminal proceeding against another party to such contract which involves consideration and determination of what the contract between the parties was, no evidence of any oral agreement or statement is admissible in such proceeding for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written contract, unless such oral evidence is admissible under one or more of the provisoes to this section.[5]

Agreement admitted by both parties.—Where an agreement is admitted by both the parties to the suit, and it is, therefore, not necessary to prove it, this section has no application. In the year 1879, the plaintiff granted a lease of certain lands to the father of the defendants. In May 1889, he agreed in writing to allow the defendants an abatement of rent to the extent of Rs. 100 per annum. This agreement was not registered, but was stated in the plaint in a previous suit brought by the plaintiff. He subsequently brought a suit against the defendants for the recovery of the entire amount of the original rent. It was held that the defendants could rely on the agreement, and that this section did

[1] Phipson, 394.
[2] Markby, 73.
[3] *Cutts v. Brown*, (1880) 6 Cal. 328, 337.
[4] *Jumna Doss v. Srinath Roy*, (1886) 17 Cal. 176 F. B., 177.
[5] *J. Reid v. So Hlaing*, (1910) 5 L. B. R. 241, F. B.; *Hock Chong & Co. v. Tha Ka Do, Colonial Trading Co. v. Mya Thee*, (1913) 7 L. B. R. 16.

not apply to it.[1] The section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.[2]

Benami transactions.—This section applies only to the terms of a transfer and does not preclude the admission of any evidence to show the *benami* character of the transaction. Otherwise *benami* transactions would have practically ceased to exist long ago.[3]

1. **'When the terms of any contract, grant or other disposition of property.'**—These words when read with the words "as between the parties to any such instrument" which follow them, refer to bilateral instruments only and not to unilateral instruments, such as wills and powers-of-attorney.

2. **'Or any matter required by law to be reduced to the form of a document.'**—These words when read with the words "as between the parties" and "any oral agreement and statement," refer to bilateral contracts, grants or other dispositions of property, which the law requires to be reduced to writing and not to every and all matters which the law requires to be reduced to writing.

3. **'Have been proved according to the last section.'**—The provisions of this section come into force when the written instruments referred to in the section have been proved in accordance with the provisions of s. 91, that is, either by the production of the document itself, or by the production of the secondary evidence of it.

4. **'No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest.'**—The section forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a written document as between the *parties* to such document or their representatives in interest. The rule of exclusion laid down in the section does not apply to the case of a *third* party who is not a party to the document. On the contrary, s. 99 distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document.[4]

The words 'between the parties to any such instrument' refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a

1 *Satyesh Chunder Sircar* v. *Dhunput Singh*, (1896) 24 Cal. 20.
2 *Sah Lal Chand* v *Indarjit*, (1900) 2 Bom L. R 553, 22 All. 370, P. C.
3 Per Sankaran Nair, J., in *Richard Taylor* v *Rajah of Parlakimedi*, (1909) 32 Mad 443.
4 *Bageshri Dayal* v *Pancho*, (1906) 28 All 473.

deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related. M conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. It was held that this section would not preclude the plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers [1] The plaintiff sued to recover money which he had been compelled to pay in virtue of a mortgage executed by his two half-sisters and himself His claim was based on the plea that, though appearing in the bond as a co-obligor, he was in reality merely a surety It was held that evidence was admissible to show that the plaintiff executed the mortgage bond as a surety only.[2]

The section does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The respondents sued the appellants to recover possession of certain parcels of land under certain deeds which purported to be absolute conveyances. The appellants contended that the said conveyances were meant to be, and had always in fact been, treated by all parties concerned as mortgages only, and they tendered evidence of acts and conduct of the parties to that effect That evidence was excluded under this section. On appeal, the Privy Council was of opinion that on the evidence the case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds, inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with notice that such property belonged in fact to a third person, the alleged mortgagor, whose evidence would be material in the matter of the alleged fraudulent dealing. The Privy Council came to the conclusion that the rejected evidence should be heard, subject to any objections which the respondents might be advised to take.[3] After the rejected evidence was heard by the Court of first instance the parties again went on appeal to the Privy Council The Judicial Committee held that as between the parties to an absolute conveyance this section precluded the giving of oral evidence to prove that the transaction was intended

1 *Mulchand* v. *Madho Ram*, (1888) 10 All 421 See *Pokal Gungayah* v *Ismail Mahomed Madaree*, (1892-1896) 2 U. B R 354.

2 *Shamsh-ul-jahan Begam* v. *Ahmad Wali Khan*, (1903) 25 All. 337.

3 *Maung Kyin* v. *Ma Shwe La*, (1911) 13 Bom L. R. 707; 38 Cal. 892, P C.

to be a mortgage. But where the grantee took knowing that a third per
a mortg
transfer
nature of the transaction.[1]

Evidence of intention, acts and conduct.—The Privy Council laid down in *Balkishen Das* v. *Legge*[2] that oral evidence of intention is not admissible for the purpose of construing a deed or ascertaining the intention of the parties to the deed. A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of re-purchase; but, after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale. It was held that the oral evidence for the purpose of ascertaining the *intention* of the parties to the deeds was not admissible and that the case must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document was related to existing facts.[3] Even after this pronouncement of the Judicial Committee there was a conflict of view between the Bombay and Madras High Courts on the one hand and the Calcutta High Court on the other on the question whether oral evidence as to acts and conduct of parties subsequent to a deed was admissible to show that what on the face of it was a conveyance of sale was in reality a mortgage. The High Courts of Bombay[4] and Madras[5] were of opinion that such evidence was not admissible. The Chief Court of Lower Burma[6] and the Judicial Commissioner's Court of Upper Burma[7] followed this view. On the other hand the Calcutta High Court was of opinion that such evidence was admissible.[8] The Chief Court of the Punjab adopted the view of the Calcutta High Court.[9] This conflict has been set at rest by the Privy Council in *Maung Kyin's case*, above referred to, in which it has expressly overruled

1 *Maung Kyin* v. *Ma Shwe La*, (1917) 44 I A. 236; 20 Bom L. R. 278, P. C

2 (1899) 2 Bom. L R. 523, 27 I. A 58, 22 All 149, P C.; *Maharu Lotu* v *Khandu Hari*, (1924) 26 Bom. L. R. 742, P C.

3 (1899) 2 Bom. L. R. 523, P. C.

4 *Dattoo* v. *Ramchandra*, (1905) 30 Bom. 119, 7 Bom. L. R. 669, *Abaji* v. *Laxman*, (1906) 30 Bom. 426, 8 Bom. L R 553.

5 *Achutaramaraju* v. *Subbaraju*, (1901) 25 Mad 7.

6 *Maung Bin* v. *Ma Hlaing*, (1905) 3 L. B. R. 100, F B.

7 *Mi Gywe* v. *Keshan Ram*, (1908) 2 U. B R (1907-1909) (Evi.) 15

8 *Preonath Shaha* v. *Madhu Sudan Bhuiya*, (1898) 25 Cal 603, F B; *Mahomed Ali Hossein* v *Nazar Ali*, (1901) 28 Cal. 289; *Khankar Abdur Rahman* v *Ali Hafez*, (1900) 28 Cal 256.

9 *Abdul Ghafur* v *Abdul Kadir*, (1901) P R No 72 of 1901; *Bulaki Mal* v. *Floyd*, (1911) P R. No 27 of 1911.

the decisions of the Calcutta High Court and approved those of the [illegible] that as between the [illegible] precludes the giving [illegible] was intended to be a mortgage.[1]

Though this section precludes oral evidence of intention for the purpose of construing deeds or proving the intention of the parties, [illegible]

Cases.—Intention, conduct, etc.—The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the grounds that the consideration was a previously existing debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee, and that the consideration was grossly inadequate. It was held that the transaction was an out-and-out sale and no evidence of several circumstances relied on could be admitted to show that it was a mortgage[3] Plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out-and-out and not a mortgage. The lower Courts held that the transaction was a mortgage and allowed redemption. It was held that evidence of intention could not be given for the purpose merely of construing a document which purported to be a sale out-and-out and not a mortgage.[4] On 23rd September, 1876, defendant wrote to plaintiff, inviting plaintiff to execute a sale-deed of certain land in favour of defendant and promising that, if plaintiff did so, defendant would discharge plaintiff's debts out of the income to be derived from the land, and would, after the debts had been discharged, or before, if so requested, restore the land to plaintiff, upon payment by plaintiff of a sum of money that had been advanced to him by defendant. This document was not registered. On 29th September, 1876, plaintiff executed a deed of sale of the land in defendant's favour, which was unconditional in its terms, and which was duly registered. Plaintiff subsequently brought a redemption suit against defendant on the deed of 29th September, and contended that though that

[1] *Maung Kyin* v. *Ma Shwe La*, (1917) 44 I. A. 236; 20 Bom. L. R. 278; 9 L B R. 114, P. C

[2] *Baijnath Singh* v *Hajee Vally Mahomed*, (1924) 27 Bom L R 787, 3 Rang 106, P. C.

[3] *Dattoo* v *Ramchandra*, (1905) 7 Bom. L. R 660, 30 Bom 119; *Kesharrao* v. *Raja*, (1906) 8 Bom. L R 287; *Bai Adhar* v. *Lalbhai Hirachand*, (1921) 24 Bom L. R. 239; *Talakchand* v. *Atmaram*, (1923) 25 Bom L. R. 818.

[4] *Abaji* v *Laxman*, (1906) 8 Bom. L. R. 553, 30 Bom. 426

deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself and defendant to show that the transaction was, in fact, not a sale but a mortgage It was held that the evidence was not admissible.[1]

An absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be a conveyance and become a mortgage because there is a right to re-purchase.[2] A deed of sale of immovable property and an agreement for re-sale to the vendor do not together constitute a mortgage unless it appears from the documents, in the light of surrounding circumstances, that the parties so intended. The intention of the parties, which is the test in such a case, must be gathered from the language of the documents themselves.[3]

Where the father in a joint Hindu family sells family property as representing all other members joint with him, those other members must be treated as parties to the sale-deed, and they cannot impugn the sale-deed by calling oral evidence that the sale-deed was a mortgage.[4]

No oral evidence is admissible to vary the terms.—Plaintiff sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant from M. A document was filed which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him. It was held that oral evidence was admissible in support of the contention that there had been a gift of the land to plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of this section Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them.[5] The executant of a promissory note cannot be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties.[6] No oral evidence is admissible to vary the amount of price fixed in a registered sale-deed,[7] or the terms of a cheque which is a negotiable instrument.[8]

1 *Achutaramaraju* v. *Subbaraju*, (1901) 25 Mad 7

2 *Bhagwan Sahai* v. *Bhagwan Din*, (1890) 17 I. A. 98.

3 *Jhanda Singh* v. *Sheikh Wahid-ud-din*, (1916) 19 Bom. L. R. 1, 43 I. A. 284

4 *Ramchandra* v. *Kashinath*, (1924) 27 Bom L. R. 241.

5 *Pathammal* v. *Syed Kalai Ravuthar*, (1903) 27 Mad. 329 See *Steel Bros. & Co., Ltd* v. *Dayal Khatao & Co*, (1923) 47 Bom. 924, 25 Bom. L R. 1063, in which evidence to vary the incidents of a c i f. contract was held inadmissible

6 *Sri Ram* v. *Sobha Ram*, (1922) 44 All 521

7 *Adityam* v. *Rama Krishna*, (1915) 38 Mad. 514.

8 *Mitchell* v. *Tennent*, (1925) 52 Cal. 677.

No oral evidence is admissible to contradict written terms.—In a suit for declaration that an apparent sale-deed executed by the plaintiff was a mortgage and for redemption, the lower Courts allowed the plaintiff to adduce evidence to prove that the defendant at the time of the execution of the sale-deed represented to the plaintiff that the sale-deed would not be enforced as such. It was held that no evidence of a contemporaneous agreement, or promise, or representation inconsistent with the written document could be admitted.[1]

No oral evidence is admissible to add a new term.—Criminal proceedings started by the plaintiffs against defendants Nos. 1 and 2 were withdrawn by the former in consideration of the agreement passed by the latter undertaking to do certain things with reference to a privy and passage between the houses belonging to the parties The agreement made no reference to a projection beyond the verandah belonging to the defendants. The plaintiff sued the defendants for the removal of the projection, stating that the complaint was withdrawn on account of the undertaking given by the defendants to remove the projection. It was held that the plaintiff was, in putting forward his case as stated in the plaint attempting to add a new term to the agreement which settled the terms of the compromise; and that, therefore, the alleged agreement sued upon was without consideration.

Oral evidence admitted where a third party is concerned.—The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.[3]

By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree *benami* for B and paid the deposit amount into Court for B and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A it was held that B was not debarred from proving that A bought the property for himself and not *benami* for B. The Court said: "Here the difference is between the actual promise to pay money into Court and the promise legally implied as the consideration for the promise to convey, but whichever of them was

1 *Dagdu Sadu Nahavi* v. *Nama Salu*, (1910) 12 Bom. L. R. 972; *Namdev* v. *Dhondu*, (1920) 22 Bom L. R. 979 See *Fitz-Holmes* v. *Bank of Upper India, Ltd*, (1923) 4 Lah. 258, in which oral evidence as to the rate of interest different from that in the written contract was held inadmissible.

2 *Jagjivan Mulji* v. *Nathji Jageshwar*, (1915) 18 Bom L. R. 90

3 *Bageshri Dayal* v. *Pancho*, (1906) 28 All. 473; *Rahiman* v. *Elahi Baksh*, (1900) 28 Cal. 70, dissented from.

the consideration the terms and character of the agreement, *viz.*, that defendant shall convey to plaintiff, are neither contradicted nor varied."[1]

The plaintiff and his divided brother purported to sell certain properties to S in 1892. Portions of the property were sold by S to defendant No. 1 (who was the plaintiff's sister's son) on the 18th August 1898; and, on the 17th September 1904, the remaining portions were sold to the same person. The plaintiff sued in 1913 to have it declared that the transaction of 1892 was a mortgage. The trial Court held that the transaction of 1892 was a mortgage and that it was so known to defendant No. 1 both in 1898 and 1904; and decreed that on payment the plaintiff was entitled to recover certain portions of the property from defendant No. 1. The lower appellate Court threw out his claim on the ground that the evidence to show that the conveyance of 1898 in favour of defendant No. 1 was a mortgage was inadmissible. On plaintiff's appeal it was held that this section had no application to the transactions of 1898 and 1904, as the plaintiff was not a party to either of them.[2]

Proviso 1.—This proviso applies to cases where evidence is admitted to show that a contract is void, or voidable, or subject to re-formation, upon the ground of fraud, duress, illegality, etc., in its inception.[3] See illustrations (*d*) and (*e*) The instances given in the proviso are not exhaustive. They are set out by way of illustration only
no defenc
to claim
the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by what has been described as the mere paper expres-

The combined effect of this proviso and s. 31 of the Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in a written contract, *e.g.*, a mistake in the description of the property sold by giving a wrong survey number to the same. The facts that the

1 *Kumara* v. *Srinivasa*, (1887) 11 Mad. 213, 215.

2 *Ganu Ramji* v. *Bhau Bapuji*, (1918) 20 Bom. L. R. 684

Per Garth, C. J, in *Cutts* v. *Brown*, (1880) 6 Cal 328, 338. *Beni Madhab Dass* v. *Sadasook Kotary*, (1905) 32 Cal 437, F. B; *Ma Zainabi* v. *Cassim Ali*, (1895) P. J L B 154; *Narayansawmy* v. *Rodriguez*, (1906) 3 L. B. R. 227; *Thiruvengada Rajoo* v. *Maung Nyo*, (1898) 2 U. B R. (1897-1901) 399; *Ma Thin Myaing* v. *Maung Gyi* (1923) 1 Rang 351.

bar to the advancement of the plea.[1] Mistake in the belief of a party to a document may be pointed out under this proviso.[2]

This proviso has no application to a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about but which for some reason they did not want to put in writing. An executant of an instrument (which was not a sham document but [illegible]

future time or after the death of the executant[3] The English Courts of Equity permit evidence to be given to show that a document was intended to operate in a manner different from the plain and apparent meaning of its language.

Where parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to re-convey the property sold on payment of the sum advanced, in the absence of fraud, misrepresentation, or failure of consideration, etc., rendering the sale invalid[4]

Fraud.—The fraud which under this proviso may be proved must be fraud which would invalidate the document and therefore subsequent fraud in respect of the document not such as to invalidate it, could not be a ground for admitting extraneous oral evidence under this proviso The real effect of admitting such evidence would not be to prove fraud in the execution of the document, but the existence of a different intention than that which appears on the document itself In other words, it would be an attempt to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document which would invalidate it[5]

Misrepresentation.—Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.[6]

Where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to agree to its formal insertion in the written contract, by representing that the stipulation in question would be in reality

[1] *Rangasami Ayyangar* v *Souri Ayyangar*, (1915) 39 Mad 792. See *Abdul Hakim Khan* v *Ram Gopal*, (1921) 44 All 246

[2] *Tani Mahesha* v *The Secretary of State for India in Council*, (1894) P. R. No 67 of 1894

[3] *Muttiyappan* v *Palani Goundan*, (1913) 38 Mad 226

[4] *Sangira Malappa* v *Ramappa Sangappa*, (1909) 11 Bom L. R. 1130, 34 Bom 59

[5] *Keshavrao* v *Raja*, (1906) 8 Bom L. R. 287; *Ganu Ranji* v. *Bhai Bapuji*, (1918) 20 Bom L. R. 684

[6] *Abaji* v. *Laxman*, (1906) 8 Bom. L. R. 553, 30 Bom. 426.

treated by him as a dead letter, it cannot be enforced because the party induced had never assented to it and its inclusion in the written contract was the result of misrepresentation.[1]

Consideration.—*When it is brought to the notice of a Court* that the consideration for a contract which it is asked to enforce is, in whole or in part, an unlawful consideration, such Court is bound to give effect to the fact thus brought to its notice, notwithstanding that the contract may appear upon the face of it to be a perfectly legal contract, and that the unlawfulness of the consideration therefor was never pleaded by the defendant [2]

This section does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract. Where, therefore, a deed of sale described the consideration to be Rs. 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs. 63-12 and Rs. 36-4 in cash, it was held that there was no real variance between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being " ready money received "[3]

A party to a contract in writing may show that, notwithstanding the recitals in the deed, the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner [4] If it were not so, facilities would be afforded for the grossest frauds. The section does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied.[5]

If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass, the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the transaction [6]

The ' want or failure of consideration ' contemplated by this proviso is a complete want or failure of consideration.

Cases.—The plaintiffs sued for specific performance of an agreement in writing which set forth, *inter alia*, that the defendants had

[1] *Sangira Malappa* v. *Ramappa Sangappa*, (1909) 11 Bom. L. R. 1130, 34 Bom. 59.

[2] *Hill* v. *Clarke*, (1904) 27 All. 266

[3] *Hukumchand* v. *Hiralal*, (1876) 3 Bom. 159; *Sheikh Muhammad Bakhsh* v. *Ramdat*, (1896) P. R No. 5 of 1896; *Le Hu* v. *Elahi Bux*, (1900) 2 U. B. R (1897-1901) 400.

[4] *Indarjit* v. *Lal Chand*, (1895) 18 All. 168.

[5] *Sah Lal Chand* v. *Indrajit*, (1900) 2 Bom. L. R. 553, 22 All 370, P. C.; *Lala Dholan Das* v. *Ralya Shah*, (1899) P. R. No. 85 of 1898; *Mussammat Zohra Jan* v. *Mussammat Rajan Bibi*, (1915) P. R No. 48 of 1915

[6] *Chunni Bibi* v. *Basanti Bibi*, (1914) 36 All 537.

the whole of the agreement between the parties, and offered parol evidence in support of their contention It was held that the parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon."[1]

The defendant, who had been gambling with the plaintiffs and had lost, gave the plaintiffs two promissory notes, partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts In a suit to recover on these notes, it was held that it was open to the defendants to prove that the consideration was in part at least money lost in gambling, and that as the part of the consideration represented by gambling debts could not be separated from the rest, the suit would fail [2]

The accused obtained an advance for which he gave a promissory note, stating that he had two boat-loads of paddy in the adjoining creek and that he would bring the paddy to the complainant for sale he then absconded It was held that oral evidence was admissible to prove the representation of intention, although such intention was not contained in the written contract, such intention not being inconsistent with the contract of loan.[3]

Plaintiff sued to recover rent under a Kabuliat The defendant admitted execution of the Kabuliat, but asserted that he executed it in order to enable the plaintiff to sell the land at a high price, the plaintiff agreeing to make over to him Rs 282 out of the purchase money, and to obtain for him from the purchaser a Mourasi Pottah of the land, it never having been intended that any rent should be payable under the Kabuliat. It was held that evidence of the oral agreement was admissible for the purpose of proving the fraudulent character of the transaction between the parties [4]

Plaintiff sued to recover Rs 30,000 due upon a promissory note executed by defendant which expressly stated that the amount was borrowed in cash In the plaint also it was alleged that Rs 30,000 was the consideration for the pro-note, but after the defendant in her pleas had denied receiving any portion of the alleged consideration, plaintiff in her replication stated that the consideration was not a sum of money but certain proprietary rights in immovable pro [illegible] dant under a deed of release [illegible] It was held that the plai[illegible] rom proving that the consideration was not money as stated in the promissory note [5]

[1] *Cutts* v *Brown*, (1880) 6 Cal 328.

[2] *Balgobind* v *Bhaggu Mal*, (1913) 35 All 558

[3] *Po Yon* v *Mohr Brothers & Co*, *Ltd.*, (1911) 6 L B R 38, *Ba Shein* v. *King-Emperor*, (1920) 10 L B R 366

[4] *Kashi Nath Chukerbati* v *Brindabun Chukerbati*, (1884) 10 Cal 649.

[5] *Mussammat Zohra Jan* v. *Mussammat Kajan Bibi*, (1915) P. R. No 48 of 1915

Proviso 2.—Under this proviso proof of any collateral parol agreement which does not interfere with the terms of the contract may be given. Parties can prove that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agree-

able to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must be clearly proved and the onus lies on him who sets it up.[1]

If there is a rule of law which requires the transaction to be in writing, any separate agreement must also be in writing.

The amount of the price agreed to be paid is an essential term of a contract of sale, and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale is admissible.[2]

In considering whether or not this proviso applies, the Court shall have regard to the formality of the document. The principal rule applies only to formally complete contracts; for in such, it is reasonable to suppose that the parties have set down all they intended, and omitted nothing. This presumption becomes weaker and weaker, as the document is found to be less and less formal And in the case of memoranda of agreements, etc., as we are not bound to presume that everything has been reduced to writing, parol testimony to prove additional terms, etc , is reasonably enough admissible The rule being confined to formal and complete documents, a mere receipt in general may be invalidated by parol evidence of fraud or mistake. So, of a loose memorandum which does not profess to embody the whole of the parties' intentions On this ground the section directs the Court, in considering whether parol testimony is to be admitted or not, to have regard to the formality of the documents see illustrations (*g*) and (*h*) [3]

The last words of the proviso show that the Court has some discretion in the application of the rule. If a document is very formal in its terms and carefully drawn up, it would be reasonable to presume that the whole intention of the parties was expressed, and that anything omitted was deliberately intended to be excluded, in which case no oral admission would be permitted.[4]

Contemporaneous oral agreement to pay interest on a Hundi— Such agreement is not admissible in evidence when there is no stipulation regarding interest in the *hundi*. In such cases the payee of

[1] *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, (1915) 17 Bom. L. R 460, 39 Bom. 399, P. C ; *Badal Ram* v. *Jhalu*, (1921) 44 All 53.

[2] *Adityam Iyer* v. *Rama Krishna Iyer*, (1913) 38 Mad 514.

[3] Norton.

[4] Markby, 73.

the *hundi* is entitled only to interest at the rate of six per cent. per annum as provided by s. 80 of the Negotiable Instruments Act.[1] If there is a collateral written agreement fixing the rate of interest, in accordance with the custom prevailing in the district, then the interest is recoverable at the rate agreed upon between the parties.[2]

Cases.—In defence to a suit upon a hypothecation bond pay-

the amount due It was held that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence [3]

An agreement to pay Rs 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his Zemindari, which agreement was come to before, but reduced to writing after, the execution of the lease was held to be not affected by this section, as it was a mere personal obligation collateral to the lease.[4]

L was a partner in the firm of R As such partner he was entitled to his proportion of certain shares of a mill and of the commission earned by his firm as agents of such mill On his retirement from the firm in 1900, entries were made in the firm's books from which it appeared that thirty-five of such shares were appropriated to the said L and that he from the date of the entries ceased to have any interest in the firm of R It was held that under this proviso and proviso 4 evidence was admissible to show that in fact the arrangement was that L should continue to be entitled to his share in the commission [5]

A mortgaged certain shops and their stock-in-trade to B. The mortgage-deed, although registered, was drawn up not by a lawyer, but by a petition-writer. B alleged an oral agreement that the mortgage should include goods which might be brought into the shops subsequent to the date of the mortgage. The terms of the deed were found to be not inconsistent with such an agreement. It was held that in considering the degree of formality of the document, the fact that it was not drawn up by a skilled lawyer was

[1] *Banwari Lal* v *Jagarnath Prasad*, (1916) 1 P L J 71, *Fathurna Bivi* v. *Hanumantha Rou*, (1907) 17 M L. J 296, *Kishor Chand* v. *Guran Ditta Mal*, (1911) P R No. 52 of 1911. See, however, *Sondamonee Debia* v *Spalding*, (1852) 12 C. L. R. 163

[2] *Ghanshiam* v. *Lalu Ram Narain*, (1906) 29 All 33. P C

[3] *Ram Bakksh* v. *Durjan*, (1887) 9 All 392.

[4] *Subramanian Chettiar* v. *Arunachelam Chettiar*, (1902) 25 Mad 603, P. C.

[5] *Narrondas* v. *Narrondas*, (1907) 31 Bom. 418, 9 Bom. L. R. 287.

of much greater importance than the fact of its being registered. Evidence of the oral agreement was held to be admissible under this proviso.[1]

Proviso 3.—This proviso means that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may be proved. An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, *i.e.*, that the legal obligation to perform the promise was to be post- [illegible] The [illegible] vhat- [illegible] h the [illegible] of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written agreement has not become binding This rule will not apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.[4] The distinction in point of law is that evidence to vary the terms of an [illegible]

paid, or something else was done [5]

A distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event.[6]

The section does not say that no statement of fact in a written instrument may be contradicted by oral evidence but that the terms of the contract may not be varied, etc. Hence, where the contract

[1] *S. N. Nachiappa Chetty* v. *A. K. A. M. Chokalingam Chetty*, (1908) 4 L. B. R. 240.

[2] *Ramjibun Serowgy* v. *Oghore Nath Chatterjee*, (1897) 25 Cal. 401; *Vishnu* v. *Ganesh*, (1921) 23 Bom. L. R. 488, 45 Bom. 1155.

[3] *Juglanund Misser* v. *Nerghan Singh*, (1880) 6 Cal 433

[4] *Juglanund Misser* v. *Nerghan Singh*, (1880) 6 Cal. 433; *Mitchell* v *Tennent*, (1925) 52 Cal. 677; *Kinlock* v *Asa Ram*, (1877) P. R. No 51 of 1877; *Khuda Baksh* v. *Budhar Mal*, (1882) P. R. No. 186 of 1882.

[5] *Pym* v. *Campbell*, (1856) 6 El & Bl 370, 371.

[6] *Ali Jawad* v. *Kulanjan Singh*, (1922) 44 All. 421.

was to sell property for Rs. 30,000 which sum was erroneously stated to have been paid, it was competent for the vendor, without infringing any provision of the Act, to prove a collateral agreement that the purchase money should remain in the vendor's hands for the purposes and subject to the conditions alleged by the vendor.[1]

Cases.—Evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for re-sale is executed was held admissible.[2] In a deed of mortgage, executed on behalf of a minor by his guardian in favour of T (who did not execute it), it was recited that the mortgage was made to secure the repayment of a certain sum which T had undertaken to expend in liquidating certain debts due by the minor's estate and amongst others a debt due to K. T having failed to pay this debt, K obtained a decree against, and was paid by, the minor's guardian In a suit brought on behalf of the minor against T to recover the amount paid in satisfaction of K's decree, T pleaded that it had been orally agreed at the time of the mortgage that he was to obtain an indemnity either from K or from the minor's guardian before payment, in case the minor repudiated the debt on coming of age It was held that the evidence in support of this plea was admissible [3]

The defendant mortgaged his property to the plaintiffs. Three days later, he passed in plaintiffs' favour a promissory note which stated that its amount was borrowed in cash. In a suit on the promissory note, the defendant contended that he did not receive any consideration, but that the note was passed to the plaintiffs by way of indemnity as he had not obtained a reconveyance from the prior mortgagee of theproperty, andthe note was to be returned to the defendant duly cancelled after such reconveyance It was held that oral evidence in support ofthe defendant's contention was admissible under this proviso, inasmuch as it amounted to the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under the promissory note in suit.[4]

Plaintiff sued defendants, as representatives of their father, on a bond executed by him. It was held that it was competent to defendants to lead evidence to show that the bond in suit was executed subject to a certain condition, which condition not having been fulfilled, there was in fact no consideration for the bond [5]

Proviso 4.—Under this proviso a prior written contract may be varied by a subsequent verbal one, in cases in which the law does not require the contract to be in writing When the original

[1] *Sak Lal Chand* v. *Indarjit*, (1900) 2 Bom L. R 553, 22 All 370, P C.

[2] *Dada Honaji* v. *Babaji Jagushet*, (1865) 2 B H C (A. C J) 36

[3] *Tiruvengada Ayyangar* v *Rangasami Nayak*, (1883) 7 Mad. 19

[4] *Ahmed Saheb* v. *Ukhaiya*, (1923) 25 Bom L R 867

[5] *Baldeo Prasad* v. *Ram Autar Kurmi*, (1924) 47 All 7.

contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration, the only way of proving the decision or modifica- ... of the

... ffect

the terms of the previous transaction by virtue of the consensus of those who alone are competent to rescind or modify the original contract, *viz.*, all the parties concerned or all their representatives.[1] The words of the proviso apply to any agreement whether executory or executed.[2]

The word 'oral' is used in the sense of being not committed to writing, and the words 'oral agreement' include all unwritten agreements, whether arrived at by word of mouth or otherwise, that is, by acts or conduct of parties.[3]

This proviso precludes evidence of an oral agreement to rescind a registered contract or of subsequent conduct of parties to show that such contract was treated as non-existent.[4] A subsequent ... registered mortgage- ... en contract, and, ... leaded that the mortgaged property was subsequently sold to them verbally for the mortgage debt and a further loan. It was held that the mortgage being by a registered deed, evidence of a subsequent oral agreement of sale would be inadmissible under this section.[6] Oral evidence is admissible to prove the discharge and satisfaction of a mortgage bond.[7] Where an oral agreement is made, which in respect of the manner of payment rescinds or modifies a contract, grant, or disposition of property required by law to be in writing and any payment is made in accordance with that oral agreement whether in complete or partial satisfaction of the contract, this section does not exclude evidence of that payment or of the oral agreement that explains it. It does exclude evidence of the agreement in respect of future payments not in accordance with the terms of the instrument.[8]

New contract.—This clause does not exclude evidence of subsequent oral agreement substituting a new contract for one reduced to writing and registered according to law, the said clause only referring to a subsequent oral agreement to rescind or modify

1 *Goseti Subba Row* v. *Varigonda Narasimham*, (1903) 27 Mad 368

2 Boddam, J., in *ibid.*

3 *Mayandi Chetti* v. *Oliver*, (1898) 22 Mad. 261.

4 *Srinivasaswami Aiyangar* v. *Athmarama Aiyar*, (1908) 32 Mad. 281.

5 *Mallappa* v. *Matum Nagu Chetty*, (1918) 42 Mad 41, F. B.; *Jagannath* v. *Shankar*, (1919) 22 Bom L. R. 39.

6 *Maung Myat Tun Aung* v. *Maung Lu Pu*, (1925) 3 Rang. 243.

7 *Ramlal* v. *Gobinda*, (1900) 4 C. W. N. 304.

8 *Sambhu* v. *Tikaram*, (1920) 17 N. L. R. 111.

such contract.[1] The distinction between a substituted new agreement by novation and the mere alteration of an old contract is that in the former case the old contract is extinguished, while in the latter it remains binding subject to the alteration which the parties have agreed to.[2]

Cases.—D sold a house to P, and executed a deed of conveyance which was duly registered. The purchase-money, however, was never paid by P, who, consequently, never obtained possession. Shortly after the conveyance had been registered, P returned it to D with an endorsement thereon to the effect that it was returned because P was unable to pay the purchase-money. The right, title and interest of P in the house was subsequently attached and sold under a decree obtained against him by the plaintiff. The plaintiff became the purchaser, and sued D for possession. The lower Courts threw out the claim on the ground that the property had not passed to P, the sale to him being incomplete. It was held (1) that the sale of the house by D to P was not incomplete. The deed purported to make an immediate transfer of the ownership of the house to P, and P accordingly became the owner of the house; (2) that the endorsement on the conveyance, not having been registered, could not affect the property, (3) that the conveyance by D to P having been registered, no oral agreement to rescind it could be proved under this proviso, (4) that the plaintiff, therefore, as purchaser of the right, title and interest of P, became the legal owner of the house, but subject to all P's liabilities, and as D had a lien upon the house for the amount of the unpaid purchase-money, the plaintiff could not obtain possession without paying off this charge.[3]

The plaintiff mortgaged certain property to the first defendant on 28th December, 1895. By the mortgage-deed the mortgage debt was made repayable on 28th December, 1896. On the 12th May, 1897, the first defendant sold it by auction under the power of sale contained in the mortgage-deed, and the second defendant was the purchaser. The plaintiff now sued to set aside the sale and to be allowed to redeem, alleging that on the day before the sale the first defendant had orally promised and agreed to postpone the sale for four days and that the second defendant had notice of this fact before he purchased the property. It was held that evidence of such oral agreement was admissible. It was not an agreement to modify any of the terms of the mortgage; it was merely an agreement to forbear, for a period of four days, from the exercise of the power of sale given by the mortgage. It, therefore, did not fall within proviso 4 of this section.[4]

[1] *Jaggat Singh* v. *Devi Ditta Mal* (1883) P. R. No. 100 of 1883.

[2] *Lakhu Ram* v. *Amir Khan* (1888) P. R. No. 14 of 1889.

[3] *Umedmal Motiram* v. *Davu bin Dhondiba*, (1878) 2 Bom. 547.

[4] *Trimbak Gangadhar Ranade* v. *Bhagwandas Mulchand*, (1895) 23 Bom. 348.

The lessor of certain land, held by the lessee under a registered deed of lease, agreed to a reduction in the rent. The agreement was not reduced to writing, but rent was thereafter paid and accepted at the reduced rate. On a suit being brought to recover arrears of rent at the rate reserved in the registered deed, it was held that under this proviso, an agreement to accept a reduced rent could not be implied or inferred from the acts and conduct of the parties, and an unwritten agreement, if so implied, amounted to an oral agreement within the meaning of the proviso.[1]

A lease contained a covenant for renewal of the lease whereby if the lessee desired to renew the lease he should give three months' notice in writing of his intention to do so. The lessee, however, failed to observe this covenant and relied on an oral agreement between himself and his lessors for renewal of the lease. It was held that evidence of such oral agreement was not admissible.[2]

In a suit for two years' rent, due under a registered lease, defendant pleaded a subsequent oral agreement by plaintiff to remit a portion of the rent each year, and filed a receipt by which plaintiff accepted payment at the reduced rate in full discharge in respect of one of the years. It was held that though under this proviso evidence of such an agreement was inadmissible and plaintiff was entitled to claim rent at the rate stipulated in the registered lease, *the discharge for one of the years was valid, under s.* 63 of the Contract Act, and took effect. It was immaterial that the discharge had been given in pursuance of the alleged oral agreement, which, though not admissible in evidence, was not illegal.[3]

An usufructuary mortgage-deed was executed in favour of S. who took possession of the mortgaged land. The deed was registered. S died, and his adopted son brought a suit to recover a portion of the land so mortgaged, alleging that, during his minority, the first defendant had taken wrongful possession of the property. The first defendant was the heir of the mor[illegible]. His defence was that the equity of redemption had beco[illegible] in himself and another as the heirs of the deceased mor[illegible] that he, as a person thus entitled to a moiety of the estate [illegible] into an oral agreement with plaintiff's adoptive mo[illegible] for the redemption of his share only, and that, [illegible] of that agreement, he had paid her a moiety of the [illegible] and redeemed the lands in ques[illegible] falling to h[illegible] held that he was not precluded f[illegible] this o[illegible]

A agreed by a register[illegible] to give B [illegible] amount by way of [illegible] subseq[illegible] orally that B should enjoy [illegible] in lieu [illegible]

1 *Mayandi Chetti* v. *Oliver*, [illegible] 22 Mad. 261. [illegible] 105, [illegible]

2 *Mark D'Cruz* v. *Jitendra* [illegible] *Chatterjee*, (1919) 46 Cal. 1079.

3 *Karampalli Unni Kurup* [illegible]

and B was put in possession. In a suit by B to recover arrears of maintenance from A it was held that the subsequent oral agreement was an agreement to rescind or modify the original registered agreement and was not receivable in evidence.[1]

A receipt which purported to show that simple and not compound interest was to be charged (though the mortgage-bond contained provision for the payment of compound interest), was held to be admissible in evidence.[2] The receipt did not require registration and was therefore admissible in evidence. It operated as a waiver.

Proviso 5.—Evidence of usage has been admitted in aid of the construction of written instruments This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind,—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language The terms used in these instruments are to be interpreted according to the recognized practice and usage with reference to which the parties are supposed to have acted, and the sense of the words, so interpreted, may [illegible] sense intended by the parti[illegible] [illegible]idence of usage must be tak[illegible] [illegible]t the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication . Where the incident sought to be annexed to a contract is unreasonable or illegal, it cannot be annexed to the contract by evidence of usage "[4]

Usage is admissible to annex unexpressed incidents (provided they are not inconsistent with those which are expressed) to oral or written contracts, grants, or wills, it being presumed that the parties have not intended to express the whole of their meaning in words, but tacitly to adopt the usages of the particular market or place.[5]

Proviso 6.—Where a document is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. But where the terms of the document themselves require explanation, then evidence can be led within the restrictions laid down in this proviso.[6] The language of this proviso is rather vague,

1 *Kattika Bapanamma* v. *Kattika Kristnamma*, (1906) 30 Mad 231.

2 *Kailash Chandra Nath* v. *Sheikh Chhenu*, (1914) 42 Cal 546.

3 Phillips, 407

4 Best, 12th Edn , s. 228, p 213; *Lu Gale* v *Maung Mo*, (1904) 2 L B R 268.

5 *Hutton* v. *Warren*, (1836) 1 M & W 466; *K M. P. R. N. M. [illegible]* v *Somasundaram Chetty & Co*, (1914) 48 Mad. 275

6 *Ganpatrao Apaji Jagtap* v *Bay[illegible] Tukaram*, (1910) 22 Bom L. [illegible]

It is true that evidence of the circumstances surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It is not permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale-deed is intended to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinized so as to enable the Court to alter or change the nature of a document to something different from what it purports to be. Otherwise, there can be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous [1]

Extrinsic evidence is receivable of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument; that is, to identify the persons and things to which the instrument refers.[2] Previous correspondence between the parties for the purpose of explaining anything in a document before the Court is admissible.[3]

Deed of one kind could be proved to be deed of another kind.—Extrinsic evidence is admissible for the purpose of showing that a document, which purports to be, and on the face of it is, a deed of sale, is in reality a deed of gift [4] Oral evidence is admissible to show that a mortgage has been subsequently converted into a sale.[5] Similarly oral evidence is admissible to show that what ostensibly purported to be a sale with an agreement for a re-sale and re-purchase at the same price at a certain date was a mortgage by conditional sale.[6]

Where, at the time of executing a document, a representation is made that the document though in form a sale-deed will not be enforced as against the executant as a sale-deed and where on the faith of that representation the executant executes the document, the sale-deed cannot be upheld as a sale-deed as against him.[7]

This proviso does not cover facts which are intended to show that the language of the document meant the exact opposite of what it purports to mean. There is no necessity for the explanation of the language used in relation to existing facts. The only object or use of such evidence, if admitted, would be to show that the language was intended to mean something which it is utterly incapable of being expressed by that language.[8] Where a docu-

1 *Martand* v. *Amritrao*, (1925) 27 Bom. L R 951.

2 *Bank of New Zealand* v. *Simpson*, [1900] A C. 182.

3 *Simla Bank Corporation, Ltd.* v. *Ball*, (1883) P. R. No 2 of 1884.

4 *Hanif-un-nisa* v. *Faiz-un-nisa*, (1911) 13 Bom. L. R. 391, 33 All. 340, P. C.; *Serajuddin Haldar* v. *Isab Haldar*, (1921) 49 Cal. 161.

5 *Badhaua Mal* v. *Hira*, (1883) P. R No. 30 of 1884.

6 *Narasingerji* v. *Panuganti Parthasaradhi R. Garu*, (1924) 47 Mad. 729, 27 Bom. L. R. 4, P. C.

7 *Navalbai Fulchand* v. *Sivubai Genu Korpe*, (1906) 8 Bom. L. R. 761.

8 *Keshavrao* v. *Raya*, (1906) 8 Bom. L. R. 287.

ment, for instance, has stood more than fifty years, it is extremely undesirable to allow evidence to be led to show that the document is not what it appears to be on the face of it [1]

Sections 93-97 partly develop and partly restrict the principle laid down by this proviso.

Cases.—Where by a deed of settlement, almost the whole of the settlor's immovable property was transferred to trustees together

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construing the deed, the subsequent conduct of the parties thereto can be legitimately looked into under this proviso for the purpose of ascertaining to what persons or things the expressions used therein were intended to apply.[2]

Exclusion of evidence to explain or amend ambiguous document

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects

Illustrations

(*a*) A agrees, in writing, to sell a horse to B for Rs 1,000 or Rs. 1,500 Evidence cannot be given to show which price was to be given

(*b*) A deed contains blanks Evidence cannot be given of facts which would show how they were meant to be filled.

COMMENT.

There are ent and latent. Patent is that on the deed or instrument, la without ambiguity, for anything that appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity.[3] A good test of the difference is to put the instrument into the hands of an ordinary intelligent educated person. If, on perusal, he sees no ambiguity, but there is nevertheless an uncertainty as to

the ambiguity

Thus, in illustr ambiguities and they could not be filled in by parol testimony as to the intention of the parties, etc In the illustration to s 95, no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic circumstances.[4]

[1] *Ganpatrao Apaji Jagtap* v. *Bapu Tukaram*, (1919) 22 Bom. L. R. 831

[2] *Subramania Ayyar* v. *Raja Rajeshwara Dorai*, (1916) 40 Mad. 1016 See *Maung Saung* v. *Maung So Hla*, (1894) 2 U. B. R. (1892-1896) 350

[3] Best, 12th Edn., s. 226, p. 211.

[4] Norton, s. 633, 352.

Under this section, if the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain.[1]

The duty of the Court is always interpretation; to find out not what really was the intention of the parties, as distinguished from what mere words expressed; but merely to find out the meaning of the words used by them.[2] To put a construction on a document is to find out the meaning of the signs and words made upon it, and their relation to facts.[3] The question is, not what was the intention of the parties, but what is the meaning of the words they have used.[4]

Extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, is admissible.[5] Thus, where there is a written agreement to deliver a quantity of grain at a particular time, parol evidence is admissible under certain limitations to show what kind of grain the contracting parties had in their contemplation at the time the contract was made.[6]

Sections 91 and 92 define the case in which documents are exclusive evidence of the transactions which they embody. Sections 93-99 deal with the interpretation of documents by oral evidence.

Exclusion of evidence against application of document to existing facts

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B, by deed, "my estate at Rampur containing 100 bighas" A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

COMMENT.

Under this section evidence to show that common words, whose meaning is plain, not appearing from the context to have been used in a peculiar sense, have been in fact so used, is not admissible.[7] Where the language in its ordinary sense properly applies to the facts without any difficulty, evidence to show that it bears a different meaning will be rejected, as it contradicts the document.

[1] *Deoji* v. *Pitambar*, (1876) 1 All. 275

[2] *Doe dem Gwillim* v. *Gwillim*, (1833) 5 B & Ad. 122, 129.

[3] Stephen's Dig, Art. 91.

[4] *Rickman* v. *Carstairs*, (1833) 5 B & Ad. 651, 663.

[5] *Valla Hataji* v *Sidoji Kondaji*, (1868) 5 B. H C. (A. C. J) 87.

[6] *Ibid*

[7] Stephen's Dig, Art. 91.

The intention of the parties to a document whose language is plain and unambiguous, should be gathered from the language of the document itself, without resorting to surrounding circumstances for aid.[1]

CASE.

On the 27th of March, 1864, one H. B. mortgaged 9½ biswas of the villages Anuda, Hasan Mahdud and Paniyala. On the 6th of February, 1873, the mortgagee executed a second mortgage of the villages comprised in the mortgage of the 27th March, 1864, but by mistake the name of the third village was entered in the schedule of property mortgaged as Halla Nagla instead of Paniyala. It was held that this section did not debar the mortgagee from giving evidence to show that the village of Paniyala was intended to be charged by the mortgage of the 6th of February, 1873: the language of the later mortgage could not be regarded as clear and unambiguous.[2]

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Evidence as to document unmeaning in reference to existing facts

Illustration.

A sells to B, by deed, "my house in Calcutta."

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

COMMENT.

This section and s 97 contain important exceptions to the general rule laid down in s 91. The illustration to this section shows that if A sells to B "my house in Calcutta," and if A has no house in Calcutta but has a house in Howrah, of which B has been in possession since the execution of the deed, these facts may be proved to show that the deed related to the house in Howrah.[3] Where a sale-deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers.[4] Where there is sufficient description set forth of the premises by giving the name of the particular field or otherwise, a false description added thereto (*e g*, the mention of a wrong survey number) may be rejected.[5]

1 *Babu v. Sitaram,* (1901) 3 Bom L. R 768.

2 *Mahabir Prasad v. Masiat-ullah,* (1915) 38 All 103.

3 *Karuppa Goundan alias Thoppala Goundan v. Periathambi Goundan,* (1907) 30 Mad 397.

4 *Ibid.*

5 *Santaja v. Savitri,* (1902) 4 Bom L. R. 871.

The section is based upon the maxim *falsa demonstratio non nocet* (a false description does not vitiate the document).

Evidence as to application of language which can apply to one only of several persons

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things *it was intended to apply to.*

Illustrations.

(*a*) A agrees to sell to B, for Rs 1,000, "my white horse" A has two white horses Evidence may be given of facts which show which of them was meant.

(*b*) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant.

COMMENT.

Where the description in the document applied equally to any one of two or more subjects, evidence to explain its language is admissible When the language of a document, though intended to apply to one person or thing only, applies equally to two or more, and it is impossible to gather from the context which was intended, an equivocation arises, *e g*, when the same name or description fits two persons or things accurately; when the same name or description fits one exactly and the other but tolerably; when the same name or description fits two objects equally but subject to a common inaccuracy, provided that the inaccuracy be a mere blank or applicable to no other person or thing.

This section modifies the rule laid down in s. 94 by providing that where the language of a document correctly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which set it was intended to apply. Here the language is certain The doubt as to which *of similar persons or things the language applies has been introduced* by extrinsic evidence.[1]

Proof may be given of every fact which identifies any person *or thing mentioned in a document in which the relation of the* words to facts has to be ascertained If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given, both of the circumstances of the case and of the statements made by any party to the document, and as to his intentions in reference to the matter to which the document relates.[2]

1 *Doe dem Hiscocks* v. *Hiscocks,* (1839) 5 M & W 363; *Nga Cho* v. *Mi Se Mi,* (1916) 2 U B. R 110.

2 Stephen's Dig, Art 91.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to B "my land at X in the occupation of Y" A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X Evidence may be given of facts showing which he meant to sell.

COMMENT.

This section is based upon the maxim *falsa demonstratio non nocet.* It is only an extension of the provision of s. 95 "Where in a written instrument the description of the person or thing intended *is applicable with legal certainty to each of several subjects,* extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author."[1] The rule rejecting erroneous description not substantially important is applicable only where there is enough to show the intention clearly.

The illustration to this section shows that if A agrees to sell to B "my land at X in the occupation of Y," and A has land at X but not in the occupation of Y, and has land in the occupation of Y but it is not at X, evidence may be given to show which was intended to be sold Another common case is where land within certain boundaries is sold and is wrongly described as containing a certain area, the error in area is regarded as a mere misdescription and does not vitiate the deed The maxim *demonstratio falsa non nocet* applies.[2]

Evidence as to meaning of illegible characters, etc

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A, a sculptor, agrees to sell to B "all my mod[illegible]" A has both models and modelling tools Evidence may be given to show which he meant to sell.

COMMENT.

Evidence as to the meaning of illegible characters (*e g.*, short-handwriter's notes) or of foreign, obsolete, technical, local and provincial expressions and of words used in a peculiar sense may be given under this section. In such cases the evidence cannot properly

1 Taylor, 11th Edn., s 1220, p. 842

2 *Karuppa Goundan alias Thoppala Goundan v Periathambi Goundan*, (1907) 30 Mad 307.

be said to vary the written instrument ; it only explains the meaning of expressions used. Mercantile usage has given special mean-

The principle upon which words are to be construed in instruments is very plain—where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the Court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention.[1]

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

COMMENT.

Section 92 forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a written document as between the parties to such document or their representatives in interest. The rule of exclusion laid down in the section does not apply to the case of a third party who is not a party to the document. On the contrary, this section distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document.[2]

The principle of s. 92 does not apply to third persons. If it were otherwise, third person[illegible]d in the writings, contrary to [illegible] lessness, or fraud of the par[illegible]t to be precluded from proving the truth, however contradictory it may be to the written statements of others.[3]

Varying.—In this section the word "varying" only is used, while in s. 92 the words are "contradicting, varying, adding to, or

[1] Per Fry, J., in *Holt & Co.* v. *Collyer*, (1881) 16 Ch. D. 718, 720.

[2] *Bageshri Dayal* v. *Pancho*, (1906) 28 All 473, 474

[3] Taylor, 11th Edn, s. 1149, p 788.

subtracting from." But it is difficult to see that in using the expression "varying" only, anything less could have been meant than what is conveyed by the several expressions in s 92, and as every "contradicting," "adding to," or "subtracting from" would necessarily be a "varying" of the instrument, the Legislature apparently use that expression as sufficient to convey all that is denoted by the other different expressions occurring in the earlier section.[1]

CASES.

The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale[2]

Plaintiff sued defendant for a piece of land, alleging that it had been given to her by a relation. The defence was that the property had been purchased by the defendant from M. A document was filed which purported to be a sale of the land to plaintiff, but defendant contended that the document had been executed in plaintiff's name *benami* for him. It was held that oral evidence was admissible in support of the contention that there had been a gift of the land to plaintiff, the question not arising as between the parties to an instrument or their privies, so as to bring it within the purview of s 92. Though plaintiff and defendant claimed through one and the same person, yet they could not be treated as parties contracting with each other, nor would oral evidence be evidence to vary the terms of any written agreement between them.[3]

In the case of an alienation of land in which a document has been executed purporting to be a deed of gift or of mortgage, it is open to a third party claiming to exercise a right of pre-emption to prove that the transaction was in reality one of sale, and that the document sought to be impugned was executed in order to conceal its real nature and to defraud him of his legal rights.[4]

Saving of provisions of Indian Succession Act relating to wills

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

[1] *Pathammal* v *Syed Kalai Ravuthar*, (1903) 27 Mad 329, 331, *Tara Chand* v *Baldeo*, (1890) P R No 117 of 1890, F B

[2] *Bageshri Dayal* v *Pancho*, (1906) 28 All 473, *Rahiman* v. *Elahi Baksh*, (1900) 28 Cal 70, dissented from

[3] *Pathammal* v. *Syed Kalai Ravuthar*, (1903) 27 Mad. 329, *Rahiman* v *Elahi Baksh*, (1900) 28 Cal. 70, dissented from

[4] *Tara Chand* v. *Baldeo*, (1890) P R. No 117 of 1890, F B., *Parma Nand* v *Arafat Ram*, (1899) P. R. No. 20 of 1899, *Megha Ram* v. *Makhan Lal*, (1912) P. R. No 67 of 1912.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

Burden of proof

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof[1] lies on that person.

Illustrations.

(*a*) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed

A must prove that B has committed the crime

(*b*) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

COMMENT.

The burden of proof lies on the party who substantially asserts the affirmative of the issue. It has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable; and also since it is but reasonable and just that the suitor who relies upon the existence of a fact should prove his own case. In its application, regard must be had to the substance and effect of the issue, and not to its grammatical form; for in many cases a party, by making a slight alteration in his pleadings, can give the issue a negative or affirmative form at his pleasure.[1]

The party on whom the onus of proof lies must, in order to succeed, establish a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clearness of his own proof.

[1] *Soward* v *Leggatt*, (1836) 7 C & P. 613, Taylor, 10th Edn, s. 364, p. 283.

The general rule that a party who desires to move the Court must prove all facts necessary for that purpose (ss. 101-105) is subject to two exceptions :—

(*a*) he will not be required to prove such facts as are specially within the knowledge of the other party (s 106) ; and

(*b*) he will not be required to prove so much of his allegations in respect of which there is any presumption of law (ss. 107-113), or, in some cases, of fact (s. 114) in his favour

1. 'Burden of proof.'—This expression means (*a*) the burden of establishing a case, and (*b*) the duty or necessity of introducing evidence.

The term *onus probandi*, in its proper use, merely means that, if a fact has to be proved, the person whose interest it is to prove it, should adduce some evidence, however slight, upon which a Court could find the fact he desires the Court to find It does not mean *that he shall call all conceivable or available evidence* It merely means that the evidence he lays before the Court should be sufficient, if not contradicted, to form the basis of a judgment and decree upon that point in his favour [1]

CASE

Where the plaintiffs, who were usufructuary mortgagees, were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired, it was held on the plea raised by the defendants that no consideration had passed, and that the burden of proving that consideration had passed was rightly shifted to the plaintiffs [2]

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom burden of proof lies

Illustrations

(*a*) A sues B for land of which B is in possession and which as A asserts, was left to A by the will of C, B s father

If no evidence were given on either side, B would be entitled to retain his possession

Therefore the burden of proof is on A

(*b*) A sues B for money due on a bond

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies

If no evidence were given on either side A would succeed as the bond is disputed and the fraud is not proved

Therefore the burden of proof is on B

1 *Unkar Nath* v. *Mitthu Lal*, (1898) 18 A W N 107.

2 [illegible] v [illegible], 33 All 483

COMMENT.

The burden of proof, in the sense of establishing a case, rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue.[1] When the evidence is all in, and a party introducing it has not, by the preponderance of evidence required by law, established his position or claim, the decision will be against him

But a party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour.[2]

The party on whom the burden of proof lies begins.

The burden must be strictly discharged; in other words, the plaintiff, in order to succeed, must put the Court in possession of legal and satisfactory evidence, and it will not suffice to point to matters of suspicion or even to plausible conjecture.[3]

CASES.

In a suit on a bond, the plaintiff accounted for the non-production of the bond, by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged he had paid it. It was held that the defendant was bound to begin and prove payment, either by the production of the bond or other evidence or by both.[4]

T

gage

which

ceipt. The original Court, which dismissed the suit, would not have decided in favour of the defendant, but for its having been shown, on an inspection of copies, officially certified, of income tax returns made by the plaintiff, that he had not stated the interest accruing on the mortgage as part of his income. It was held, reversing the judgment, that the returns, if the plaintiff had wrongly omitted to make a full return of income, would not have had any weight in changing the onus which lay upon the defendant of showing that no consideration had passed for this mortgage.[5]

Where execution of a bond is admitted and the bond contains an admission that consideration had passed, it is for the executant to get rid of the admission which he has made in the bond. It is

1 Phipson, p. 14.

2 *Mano Mohun Ghose* v. *Mothura Mohun Roy*, (1881) 7 Cal. 225

3 *Ramabai* v. *Ramchandra*, (1905) 7 Bom. L. R. 293.

4 *Chuni Kuar* v *Udai Ram*, (1883) 6 All. 73.

5 *Ali Khan Bahadur* v *Indar Parshad*, (1896) 23 Cal. 950, P. C.

6 *Mahabir Prasad Rai* v. *Bishan Dayal*, (1904) 27 All. 71. See *Achaya* v. *Maung Po Saing*, (1920) 10 L. B. R 264

It lies on him who asserts it to prove that the law of the Native State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific acts of the Legislature.[1]

Where a claim is made under an alleged mortgage against a *bona fide* purchaser for value, and the defendant puts in issue the genuineness of the transaction, the onus is upon the plaintiff of proving *prima facie* the *bona fides*, as well as the actual execution, of the mortgage; and if the Court discredits the plaintiff's witnesses as regards the *bona fides* of the transaction, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud.[2]

A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story.[3]

Burden of proof as to particular fact

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

COMMENT.

This section differs from s. 101. By s. 101 the party has to prove the whole of the facts [illegible]
ment when the burden of the [illegible]
for the proof of some one part [illegible]
points the meaning. The whole of the facts, however numerous and complicated, which go to make up the prisoner's guilt, must be proved by the prosecution. If the prisoner wishes to prove a particular fact, his *alibi*, for instance, he must prove it. If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the prisoner's admission, or if he wishes [illegible]

fact [illegible]
Procedure Code, which says that all persons shall give information of the commission of certain offences to the nearest police officer or

[1] *Raghunath Mulchand* v. *Varjivandas Madanji*, (1906) 30 Bom. 578.

[2] *Brajeshwari Peshakar* v. *Budhanuddi*, (1880) 6 Cal. 268.

[3] *Mahomed Golab* v. *Mahomed Sulliman*, (1894) 21 Cal. 612.

[4] Norton, 289.

Magistrate, and throws upon such persons the burden of proving reasonable excuse for not doing so.

Burden of proving fact to be proved to make evidence admissible

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

(*a*) A wishes to prove a dying declaration by B A must prove B's death

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document

A must prove that the document has been lost.

COMMENT.

The party, whose case requires proof of an evidentiary effect, has the onus of introducing evidence to prove that fact.

This section should be read with cl 2 of s. 136 and with the illustrations attached to that section.

CASE

A merchant, bearing a French name, married a French woman in British India without contract. Some time after the marriage, he settled, on trusts, certain immovable property in Calcutta. Later on, the property was sold and the sale-proceeds invested in some funds It was contended that the settlor was a Frenchman with French domicile and, as such, the French law must govern the administration of his property. It was held that the burden of proving that the settlor was a Frenchman of French domicile was on those who attacked the settlement, and that they must conclusively prove it [1]

Burden of proving that case of accused comes within exceptions

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions[1] in the Indian Penal Code, or within any special exception[2] or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(*a*) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

1 *Bonnaud* v. *Emile Charriol*, (1905) 32 Cal 631.

The burden of proof is on A

(*b*) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control

The burden of proof is on A.

(*c*) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under section 325

The burden of proving the circumstances bringing the case under section 335 lies on A

COMMENT.

T[illegible] in criminal [illegible] the charge [illegible]

In all criminal cases it is incumbent on the accused to prove the existence (if any) of circumstances which bring the offence charged within the general or special exceptions or provisos contained in any part of the Penal Code or in any law defining such offence [1]

An accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence, neither is the Court competent to raise such a plea on behalf of the appellant [2]

1. 'General exceptions.'—The general exceptions here referred to are those applicable to all crimes, and are given in Chapter IV of the Indian Penal Code

2. 'Special exceptions.'—Special exceptions are those which are restricted to a particular crime

Burden of proving fact especially within knowledge

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(*a*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him

(*b*) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him

COMMENT.

This section lays down the principle that where the knowledge of the subject-matter of an allegation is peculiarly within the pro-

1 See *Nga Mya v. King-Emperor*, (1915) 8 L. B. R. 306

2 *Queen-Empress v. Timmal* (1898) 21 All. 122

he is dead, and further that, as regards property coming to him by inheritance, he must be deemed to have died at the date of his disappearance, is a rule of evidence only and must be taken to have been superseded by this section[1]

The earliest date to which the death can be presumed can only be the date when the suit to claim that right is filed. It cannot have a further retrospective effect.[2]

Section 108 raises no presumption as to the time of a person's death It is incumbent on him, who alleges that a person died at some antecedent date, to prove that fact by evidence. The question for which provision is made in this section is the question, whether a man is alive or dead when the question of death is raised, and not whether he was alive or dead at some antecedent date.[3] If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years, there is no presumption that such person died during the first period of seven years and not at any subsequent period.[4]

Section 108 does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it.[5]

The rule of Mahomedan law that a missing person is to be regarded as alive till the expiry of ninety years from the date of his birth is overruled by this section.[6] So is the rule of Hindu law that twelve years must elapse before an absent person, of whom nothing has been heard during this period, can be presumed to be dead.

CASES.

The plaintiff sued in 1911 as a reversioner to recover possession of property alienated by a Hindu widow. The widow had disappeared in 1865 and was not heard of since 1870. The Court of first instance decided in plaintiff's favour and held that under this section the Court should presume that the widow died at the time of suit and that therefore the suit was in time. This decision was reversed and the suit was dismissed by the lower appellate Court on the ground that the presumption of the widow's death at the time of the suit could not be drawn, and that the *onus probandi* lay heavily on the plaintiff to show when the widow died, and that consequently the suit was not shown to be within time. The plaintiff having appealed, it was held that it lay on the plaintiff to show

1 *Mairaj Fatima* v. *Abul Wahid*, (1921) 43 All. 673

2 *Jeshankar* v. *Bai Divali*, (1919) 22 Bom. L. R 771.

3 *Fani Bhushan Banerji* v. *Surjya Kanta Roy Choudhry* (1907) 35 Cal. 25; *Narki* v. *Lal Sahu*, (1909) 37 Cal. 103; *Basharat* v. *Najib Khan*, (1917) P. R. No. 38 of 1918

4 *Muhammad Sharif* v. *Bande Ali*, (1911) 34 All 36, F. B.

5 *Narayan Bhagwant* v. *Shriniwas Trimbak*, (1905) 8 Bom. L. R. 226.

6 *Mazhar Ali* v. *Budh Singh*, (1884) 7 All. 297, F B

affirmatively that he had brought his suit within twelve years from the actual death of the widow.[1]

A, a Mahomedan, died in 1884, and his estate was divided amongst his heirs. B, the eldest son of A, had disappeared in 1870 and had not since been heard of; and under Mahomedan law, a share of the estate was set aside for him as a missing heir. C, the son of B, claimed this share, to which he would have been entitled, under Mahomedan law, if B had been alive at the time of A's death, but not otherwise. It was held that the special rules regarding burden of proof in ss. 107 and 108 could only be applied with reference to the date of the suit, and not to the question whether B was alive or dead on a specified prior date; and that the burden of proving that B was alive in 1884 lay upon C, who affirmed it.[2]

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent

109. When the question is whether persons are partners,[1] landlord and tenant,[2] or principal and agent,[3] and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

COMMENT.

A partnership, tenancy, agency, once shown to exist, is presumed to continue, till it is proved to have been dissolved.

When a juridical relation is once established, it is enough generally for a party relying on such relation to show its establishment, and the burden is then on the opposite party to show that the relation has ceased to exist.[3]

1. 'Partners.'—As to partnership see ss. 239-266 of the Indian Contract Act (IX of 1872). Section 264 enacts that persons dealing with a firm shall not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution.

2. '*Landlord and tenant*,'—When the relationship of landlord and tenant has once been proved to exist, the mere non-payment of rent, though for many years, is not sufficient to show that a relationship has ceased.[4]

3. 'Principal and agent.'—Sections 182-238 of the Indian Contract Act deal with the relationship of principal and agent.

[1] *Jayawant Jivanrao v Ramchandra Narayan*, (1915) 18 Bom. L. R 14.

[2] *Moolla Cassim v Moolla Abdul Rahim*, (1902) 4 L. B R. 77, P C.

[3] Wharton, s 1284

[4] *Rungo Lall Mundul v. Abdool Guffoor*, (1878) 4 Cal 314; *The British India Steam Navigation Company, Limited v. Hajee Mahomed Esack and Company*, (1881) 3 Mad. 107; *Attar Singh v. Ram Ditta*, (1881) P R. No 110 of 1881.

he is dead, and further that, as regards property coming to him by inheritance, he must be deemed to have died at the date of his disappearance, is a rule of evidence only and must be taken to have been superseded by this section.[1]

The earliest date to which the death can be presumed can only be the date when the suit to claim that right is filed It cannot have a further retrospective effect.[2]

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Section 108 does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it.[5]

The rule of Mahomedan law that a missing person is to be regarded as alive till the expiry of ninety years from the date of his birth is overruled by this section.[6] So is the rule of Hindu law that twelve years must elapse before an absent person, of whom nothing has been heard during this period, can be presumed to be dead.

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[1] *Mairaj Fatima* v *Abul Wahid*, (1921) 43 All. 673

[2] *Jeshankar* v *Bai Divali*, (1919) 22 Bom L. R. 771.

[3] *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry*. (1907) 35 Cal. 25; *Narki* v. *Lal Sahu*, (1909) 37 Cal. 103; *Basharat* v. *Najib Khan*, (1917) P. R. No. 38 of 1918

[4] *Muhammad Sharif* v. *Bande Ali*, (1911) 34 All. 36, F. B.

[5] *Narayan Bhagwant* v. *Shriniwas Trimbak*, (1905) 8 Bom. L R 226

[6] *Mazhar Ali* v. *Budh Singh*, (1884) 7 All 297, F B.

years cannot be sufficient for the purpose.[1] Thus in cases other than possessory suits under the Specific Relief Act the plaintiff must show title or such adverse possession as confers a title under the Limitation Act.

The Madras High Court has held that, as against a wrong-doer, prior possession of the plaintiff in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of, and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. It is immaterial however short or recent the plaintiff's possession was.[2]

The Allahabad High Court has in a Full Bench case held that section 9 of the Specific Relief Act does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title, from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession.[3]

The Patna High Court has held that a plaintiff who has omitted to sue under s. 9 of the Specific Relief Act, when first dispossessed, is not debarred from relying, in a suit for ejectment, on s. 110 of the Evidence Act. As soon as he has proved that the defendant has dispossessed him the onus is thrown upon the latter to prove his title.[4]

The Privy Council has laid down in a case in which the plaintiff was a purchaser in possession and the defendant had no title at all, that lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree and an injunction restraining the wrong-doer.[5] In this case the plaintiff was in possession when he brought his suit and he asked for a decree declaring his right, and an injunction restraining the defendant from disturbing his possession.

CASES.

Where a vendee of immovable property sues for possession, his vender not having been in possession at the time of the sale, it lies

1 *Nisa Chand* v. *Kanchiram*, (1899) 26 Cal 579, 584; *Shama Churn* v *Abdul Kabeer*, (1898) 3 C W. N 158 Doubt has been expressed as [illegible] 41 Cal 391 But it has been approved of in *Nata Kishore* v. *Paro Bera*, (1922) 50 Cal 23

2 *Narayana Row* v. *Dharmachar*, (1902) 26 Mad 514 See *Krishna Aiyar* v *Secretary of State for India*, (1909) 33 Mad 173

3 *Wali Ahmad* v *Ajudhia Kandu*, (1891) 13 All 537, F B. See *Lachho* v *Har Sahai*, (1887) 12 All 46; *Gobind Prasad* v *Mohan Lal*, (1901) 24 All 157

4 *Hiralhan Mandal* v *Isar Das*, (1916) 2 P L J 61

5 *Ismail Ariff* v *Mahomed Ghouse*, (1893) L R 20 I A 99, 20 Cal. 834; *Sundar* v. *Parbati*, (1889) 12 All 51, P. C.

the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out....Where no such title is made out, and plaintiff comes into Court and asks for a declaratory decree he cannot obtain that decree on the mere ground that he was in possession, and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof."[1] In a subsequent case, Batty, J., observed: "Now prior possession is certainly a ground on which, as *prima facie* evidence of title, a plaintiff may recover possession in the absence of title set up by the defendant even though his suit does not fall within section 9 of the Specific Relief Act...But then it must be found not only that the plaintiff's prior possession was within twelve years of suit, but also that it was a juridical possession of the property claimed."[2] The judgment of Ranade, J., is criticised in *Ali* v. *Pachubibi*[3] which lays down that a plaintiff who proves that, while in peaceable possession, he was dispossessed by the defendant wrongfully, is entitled to recover because his previous possession is tantamount to his title as against a wrong-doer. "There is a difference between such a suit and a suit under s. 9 of the Specific Relief Act. In the former, the Court awards the claim only when it finds that the plaintiff had peaceable possession before dispossession and that the defendant has no title and is a wrong-doer, the plaintiff's previous possession being in law sufficient proof of his title, in the latter, the Court can only go into the question of dispossession within six months before suit and cannot enquire into the defendant's title."[4]

The Calcutta High Court has held that mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under s. 9 of the Specific Relief Act.[5] In a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve

1 *Hanmantrav* v. *Secretary of State*, (1900) 25 Bom. 287, 303.

2 *Rajaram* v. *Nanchand*, (1903) 5 Bom L. R. 225, 227.

3 (1903) 5 Bom L R 264.

4 Per Chandavarkar, J, in *ibid*, p. 267. In an ejectment suit the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title. *Kalu* v *Barsu*, (1894) 19 Bom. 803 Plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's: *Jowala Buksh* v. *Dharum Singh*, (1866) 10 M. I. A. 511; *Thakur Basant Singh* v. *Mahabir Pershad*, (1913) 15 Bom. L. R. 525, 530, P. C; *Dharani Kanta Lahiri* v. *Gabar Ali Khan*, (1912) 15 Bom. L [illegible]

a present right to possession: *Sitaram Bhimaji* v. *Sadhu Awaji*, (1913) 16 Bom. L. R. 132.

5 *Ertaza Hossein* v *Bany Mistry*, (1882) 9 Cal 130; *Debi Churn* v. *Issur Chunder*, (1882) 9 Cal. 39; *Purmeshur* v. *Brijo Lall*, (1889) 17 Cal 256.

action is on the party who is in a position of active confidence

Illustrations.

(*a*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client The burden of proving the good faith of the transaction is on the attorney

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son The burden of proving the good faith of the transaction is on the father

COMMENT.

Where a fiduciary or quasi-fiduciary relation exists, the burden of sustaining a transaction between the parties rests with the party who stands in such relation and is benefited by it. The plaintiff having been entirely in the hands of the defendant, would be destitute of the means of proving affirmatively the *mala fides* of the transaction, whilst the defendant in such a transaction may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so.[1] In such cases it is seldom possible to prove specific acts of bad faith. Yet the risk of abuse is obviously great The law, therefore, reverses its usual rule of evidence in dealing between man and man. Commonly nothing is presumed contrary to good faith. But this is the rule between equals. When one party habitually looks up to the other and is guided by him, he can no longer be supposed capable, without special precaution, of exercising that independent judgment which is requisite for his consent to be free.[2]

Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them [3] This has been held to apply to a trustee, an executor, an administrator, a guardian, an agent, a minister of religion, a medical attendant, an auctioneer, and an attorney.

In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who executed them.[4]

CASE.

In a suit for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a *chatri* by caste.

1 Markby

2 Pollock's Law of Fraud in British India, pp 63, 64

3 *Raghunathji Mulchand* v *Varjiwandas Madanjee,* (1906) 8 Bom L. R. 525; *Hoti Lal* v. *Mussammat Ram Piari,* (1903) P. R. No. 77 of 1903

4 *Sudisht Lal* v. *Mussamut Sheobarat Koer,* (1881) 7 Cal 245, P. C.; L. R. 8 I. A. 39.

upon the plaintiff to show that his vendor was in possession at some period within twelve years prior to the date of the suit.[1]

The plaintiff sued the Government for a declaration that a

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Rs. 20 to the plaintiffs' father. It was held that the possession of the plaintiffs being peaceable and obtained without ousting anyone, it was of such a character as to attract the presumption described in this section, and was good against the whole world except the person who could show a better title, and that, as the Government had failed to establish their title to the land, the plaintiffs were lawfully entitled to its possession.[2]

S obtained a money decree against the sons and heirs of A, and under that decree attached a shop as part of A's estate. N (father

perty as against the defendant.[3]

The respondents claimed the land in suit on the ground that

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nied the alleged

and cleared it

about twelve years ago with the subsequent acquiescence of a person who claimed to be the owner. The question for decision was whether the burden of proving that they were entitled to recover possession was on the respondents, or whether the appellant was under the obligation of proving that he was entitled to retain possession. It was held that the burden of proving their case rested on the respondents and that they were not entitled to succeed merely because the appellant failed to prove his title.[4]

Proof of good faith in transactions where one party is in relation of active confidence.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the trans-

1 *Deba* v. *Rohtagi Mal*, (1906) 28 All. 479.

2 *Hanmantrao* v. *Secretary of State for India*, (1900) 25 Bom. 237; 2 Bom. L. R. 1111.

3 *Pemraj Bhavaniram* v. *Narayan Shivram Khisty*, (1882) 6 Bom 215, F.B; *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar*, (1884) 8 Bom. 371

4 *Maung Min Din* v. *Maung On Gaung*, (1899) 2 U. B. R. (1897-1901), 421.

legitimacy of the children of married persons only.[1] On the birth of a child during marriage the presumption of legitimacy is conclusive, no matter how soon the birth occurs after the marriage[2] Under this section the child born in wedlock should be treated as the child of the father who was at the time of its birth, the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception, quite irrespective of the question whether the mother was a married woman or not at the time of the conception.[3]

A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established[4] The presumption that children born of a married woman during the life-time of her husband are the legitimate offsprings of that woman and her husband, is not conclusive proof of their legitimacy and must be regarded as fully rebutted where the woman admittedly lived for years with another person and they both asserted such children to be the offsprings of their union.[5] It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage.[6]

2. **'Within two hundred and eighty days after its dissolution, the mother remaining unmarried.'**—This section does not lay down a maximum period of gestation, and therefore does not bar the proof of the legitimacy of a child born more than 280 days after dissolution of marriage, the effect of the section being merely that no presumption in favour of legitimacy is raised, and the question must be decided simply upon the evidence for and against legitimacy.[7] When a person claims, under this section, to be the son of a deceased person, he must prove that he was born within two hundred and eighty days after the death of his father.[8]

3. **'The parties to the marriage had no access to each other.'**—By 'having no access' is meant having no opportunity of sexual intercourse; and in order to displace the conclusive presumption it must be shown that no such opportunity occurred down to a point of time so near to the birth as to render paternity impossible. To rebut the legal presumption under this section, it is for those, who dispute the paternity of the child, to prove non-access of the husband to his wife during the period when, with respect to the date of its birth, it must, in the ordinary course of nature, have been begotten.[9] If the husband has had access, adultery on the wife's

1 *In re Ma Son*, (1896) 1 U. B. R. (1892-1896) 74.

2 *Umra* v. *Muhammad Hayat*, (1907) P. R. No 79 of 1907.

3 *Palani* v. *Sethu*, (1924) 47 Mad. 706

4 *Gopalasami Chetti* v. *Arunachellam Chetti*, (1903) 27 Mad. 32, 33.

5 *Bahadur Singh* v. *Vrm*, (1905) P. R. No 28 of 1906.

6 *Thakur Amjal Ali Khan* v. *Nawab Ali Khan*, (1906) 9 Bom L. R. 264.

7 *Rahmat Ali* v. *Musst Allahdi*, (1883) P. R. No. 1 of 1884

8 *Narendra* v. *Ram Gobind*, (1901) 4 Bom. L. R. 243, 29 Cal. 111, P. C.

9 *Narendra* v. *Ram Gobind*, (1901) 4 Bom L. R. 243, 29 Cal. 111, P. C.

well advanced in years, and the defendant was his *guru*, or spiritual

secure benefits to his soul in the next world, and his having heard the defendant recite the holy book called Bhagvat. Almost immediately after the execution of the deed the plaintiff repudiated

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made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed.[1]

Birth during marriage conclusive proof of legitimacy

112. The fact that any person was born during the continuance of a valid marriage[1] between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried,[2] shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other[2] at any time when he could have been begotten.

COMMENT.

This section is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be presumed.[2]

Sections 112 and 113 are the only two sections in which a direct attempt is made to establish what is called "conclusive proof." No rule of the kind can be based on considerations of evidence, because enquiry is altogether excluded The basis of the rule in the first case (s 112) seems to be a notice that it is undesirable to enquire into the paternity of a child whose parents 'have access' to each other. This section refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child, the latter point of time has to be considered only to see whether the husband had not access to the mother.[3]

1. 'During the continuance of a valid marriage.'— The presumption as to paternity in this section only arises in connection with the offspring of a married couple. This section applies to the

[1] *Mannu Singh* v. *Umadat Pande*, (1890) 12 All. 523

[2] *Bhima* v. *Dhulappa*, (1904) 7 Bom L. R. 95.

[3] *Palani* v *Sethu*, (1924) 47 Mad. 706.

legitimacy of the children of married persons only[1] On the birth of a child during marriage the presumption of legitimacy is conclusive, no matter how soon the birth occurs after the marriage.[2] Under this section the child born in wedlock should be treated as the child of the father who was at the time of its birth, the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception, quite irrespective of the question whether the mother was a married woman or not at the time of the conception[3]

A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.[4] The presumption that children born of a married woman during the life-time of her husband are the legitimate offsprings of that woman and her husband, is not conclusive proof of their legitimacy and must be regarded as fully rebutted where the woman admittedly lived for years with another person and they both asserted such children to be the offsprings of their union[5] It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage.[6]

2. 'Within two hundred and eighty days after its dissolution, the mother remaining unmarried.'—This section does not

When a person claims, under this section, to be the son of a deceased person, he must prove that he was born within two hundred and eighty days after the death of his father.[8]

3. 'The parties to the marriage had no access to each other.'—By 'having no access' is meant having no opportunity of sexual intercourse; and in order to displace the conclusive presumption it must be shown that no such opportunity occurred down to a point of time so near to the birth as to render paternity impossible. To rebut the legal presumption under this section, it is for those, who dispute the paternity of the child, to prove non-access of the husband to his wife during the period when, with respect to the date of its birth, it must, in the ordinary course of nature, have been begotten.[9] If the husband has had access, adultery on the wife's

1 *In re Ma Son*, (1896) 1 U. B. R. (1892-1896) 74

2 *Umra* v. *Muhammad Hayat*, (1907) P. R. No 79 of 1907

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4 *Gopalasami Chetti* v. *Arunachellam Chetti*, (1903) 27 Mad. 32, 33

5 *Bahadur Singh* v *Viru*, (1905) P R. No. 28 of 1906

8 *Narendra* v *Ram Gobind*, (1901) 4 Bom. L. R. 243, 29 Cal. 111, P. C.

9 *Narendra* v *Ram Gobind*, (1901) 4 Bom. L. R 243, 29 Cal. 111, P. C.

part will not justify a finding that another man was the father.[1] If a child is born 223 days after the death of the husband, that is under such circumstances as to give rise to the presumption under this section, the burden of proof lies on him who disputes the paternity of the child.[2]

A wife can be examined to prove non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of the children.[3] Under the common law neither husband nor wife can be examined for the purpose of proving non-access during marriage In England the presumption of legitimacy may be rebutted by proof of the impotency of the husband. Under the Indian Evidence Act no such proof can be given.

Mahomedan law.—According to Mahomedan law a child born six months after marriage or within two years after divorce or the death of the husband is presumed to be his legitimate offspring. If the question for decision be one of evidence only, it will be governed by this section.[4]

One R, a Mahomedan woman, was divorced by her first husband on the 1st October 1895. She married G. N. on the 4th February 1896 and bore a child on the 17th July 1896: the child was thus born more than 280 days after the dissolution of his mother's marriage with her first husband but less than six months after her marriage with G. N. The plaintiff contended that under Mahomedan law no acknowledgment of paternity by G. N. could legitimise the child, and it was found that the *iddat* of repudiation had terminated before the marriage with G. N., although the child must have been procreated before the termination of that *iddat*. G. N. acknowledged the child and treated it as his own. It was held that the marriage of R. with G. N. though irregular was not void; that when the child was bo[illegible] G. N. subsisted; that this se[illegible] the child was entitled to inhe[illegible]

CASES.

Where a wife came to her husband's house a few days before he died and remained there up to the time of his death, and it was shown that a child, alleged to be that of her husband, was the child of the wife, and that it was born within the time necessary to give rise to the presumption under this section, it was held, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him, that the presumption as to the paternity of the child given by this section

[1] *Nga Tun E.* v *Mi Chon*, (1914) 2 U. B. R. 23.

[2] *Tirlok Nath Shukul* v. *Lachhmin Kunwari*, (1903) L. R. 30 I. A. 152, 5 Bom. L. R. 474, 25 All 403.

[3] *Rozario* v. *Ingles*, (1893) 18 Bom 468.

[4] *Mazhar Ali* v. *Budh Singh*, (1884) 7 All. 297, F. B.

[5] *Nur-ul-Hasan* v. *Muhammad Hasan*, (1910) P. R. No. 78 of 1910.

must prevail. The fact that the husband was, during the period within which the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards was held, under the circumstances, not sufficient to rebut the presumption.[1] Where a child born some three hundred and sixty-five days after the

of possibility, yet there being evidence that the mother had been married to her husband for ten years without having had any child-

person, it was held that, there being no inherent impossibility of gestation of 330 or 333 days after co-habitation, this fact alone, though suspicious, was not conclusive as to the wife's adultery, and that the child must be held to be legitimate having regard to this section.[3]

A woman married a person in September 1903; the marriage was dissolved in May 1904; she married another in June 1904; a son was born to her in September 1904 during the continuance of

properties.

then the conclusive proof in favour of the plaintiff arises and can only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by the husband of his mother.[5]

1 *Narendra* v. *Ram Gobind*, (1901) 4 Bom. L. R 243, 29 Cal. 111, P. C.

2 *Tikam Singh* v. *Dhan Kunwar*, (1902) 24 All. 445.

3 *P.* v. *P.*, (1911) P. R. No. 77 of 1911.

4 *Palani* v. *Sethu*, (1924) 47 Mad. 706.

5 *Bhima* v. *Dhulappa*, (1904) 7 Bom. L. R. 95.

Proof of cession of territory

113. A notification in the Gazette of India that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

COMMENT.

This section was enacted to exclude inquiry, by Courts of Justice, into the validity of the acts of the Government so far as cession of territory to any Native State was conerned. But the section is a dead-letter because it is declared to be *ultra vires* by the Privy Council in a case in which it is decided that the Governor General in Council being precluded by the Act 24 & 25 Vic. c. 67, s 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in the Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession.[1]

Court may presume existence of certain facts

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events,[1] human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume—

(*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession,

(*b*) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(*c*) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration,

(*d*) that a thing or state of things which has been shown to be in existence *within a period shorter than that within which such things or states of things* usually cease to exist, is still in existence,

(*e*) that judicial and official acts have been regularly performed;

(*f*) that the common course of business has been followed in particular cases;

(*g*) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

1 *Damodar Gordhan* v. *Devram Kanji*, (1876) 1 Bom. 367, P. C.

(*h*) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i*) that when a document creating an obligation is in the hands of the obligor the obligation has been discharged

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it —

as to *illustration* (*a*)—a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

as to *illustration* (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself

as to *illustration* (*b*)—a crime is committed by several persons A, B and C three of the criminals, are captured on the spot and kept apart from each other Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

as to *illustration* (*c*)—A, the drawer of a bill of exchange, was a man of business, B, the acceptor, was a young and ignorant person, completely under A's influence

as to *illustration* (*d*)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

as to *illustration* (*e*)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances

as to *illustration* (*f*)—the question is, whether a letter was received It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

as to *illustration* (*g*)—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

as to *illustration* (*h*)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked.

as to *illustration* (*i*)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it

COMMENT.

Sections 104 to 113 direct on whom burden of proof will lie.

are various presumptions where room is left for the Court to exercise its powers of inference. The Court can throw the burden of proof on whichever side it chooses. This section deals with cases of that description. It declares that the Court may, in all cases whatever, draw from the facts before it, whatever inferences it thinks just. The terms of the section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretion a large number of presumptions to which English law gives, to a greater or less extent, an artificial value Nine of the most important of them are given by way of illustration.[1]

This section authorises the Court to make certain presumptions of fact. They are all presumptions which may naturally arise, but the Legislature, by the use of the word 'may' instead of 'shall' both in the body of that section and the illustrations, shows that the Court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised.[2]

The effect of this provision is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no particular rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section (114) in question.[3]

[illegible] or fact. Pre- [illegible] presumptions [illegible] presumptions [illegible] are always re- [illegible] partly of law and partly of fact.[4]

Presumptions of law derive their force from *law*; while presumptions of fact derive their force from *logic*.

Presumptions of law are, in the absence of opposing evidence, conclusive for the party in whose favour they operate; but, as regards presumptions of fact, the Jury may disregard them however cogent.[5]

As to statutory presumptions, see ss. 118, 119-122, 137 of the Negotiable Instruments Act; ss. 53 and 101 of the Transfer of Property Act; s. 6 of the Land Acquisition Act (I of 1894). There are various other statutory presumptions.

The chief function of rebuttable presumption of law is to determine on whom the burden of proof rests.

1 Stephen's Introduction to Evidence Act.

2 *Muthukumarswami Pillai* v. *King-Emperor*, (1912) 35 Mad. 397.

3 Gazette of India, 30th March 1872, Supplement, pp. 234-235.

4 Phipson, p. 420

5 *Ibid*, pp. 421, 422.

1. 'Common course of natural events.' This expression is appropriate in regard to such matters as the period of gestation or the continuance of life The legitimacy of a child may have to be decided by reference to the term during which in the ordinary course of nature gestation may continue.

2. 'Human conduct.'—As an example of an inference to be drawn from the conduct of a person the following is apposite. It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such servant fails to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and *dishonestly converted it to his own use. In such cases the Courts* are entitled to draw hostile inferences and presumptions from the actions and statements of the servant.[1]

Illustrations.—The illustrations given under this section are not exhaustive. They are merely a few examples of this class of "natural" presumptions, and that they do not exclude the other numerous cases in which such presumptions are constantly drawn. The Court need not draw the presumption in any particular case. The word used is "may"; and wherever the informative facts proved, overbalance the probability that the inference would be a sound and just one, the Court will exercise its sound discretion in electing not to rest upon the presumption.[2] There are several pre- [illegible] law, Mahomedan law, criminal law, [illegible] a Hindu family must be presumed [illegible] joint Hindu family the whole property of the family is joint estate; in the absence of express contract a Mahomedan dowry is presumed to be prompt. Every person above the age of fourteen is presumed to be acquainted with the law of the land; the accused is presumed to be innocent.

Illustration (a).—This illustration raises two presumptions, *viz.*, that the person in possession of stolen goods soon after the theft is (1) either the thief, or (2) has received the goods knowing them to be stolen. The question as to which of the two presumptions is to be drawn will depend upon the facts of each particular case. The mere fact of recent possession of stolen property is in general evidence of theft, not of receipt of stolen property with guilty knowledge.[3] The presumption contemplated in this illustration is not a presumption as to the fact of possession, but the presumption of guilt which arises from the accused not accounting for his posses-

1 *Sona Meah* v. *King-Emperor*, (1924) 2 Rang. 476. See *Abdul Gani*, (1925) 27 Bom. L. R.

2 Norton, 299.

3 *Nga Kywet* v. *Queen-Empress*, (1900) 1 L. B. R. 39; *Nga Don Be* v. *The Crown*, (1902) 1 L. B. R. 332; *Karpini* v. *Queen-Empress*, (1896) P J. L. B. 276; *Mi Myit* v. *Queen-Empress*, (1897) 1 U. B. R. (1897-1901) 171.

sion of stolen goods of which he is proved to be in possession soon after the theft. This presumption of guilt cannot, therefore, arise before such actual possession is proved, or before the accused, on opportunity being given, fails to account for his possession.[1]

Possession must be a recent possession. Lapse of time rebuts the presumption. Where stolen articles of a very common description, consisting of jewellery of a very ordinary type and by no means of distinctive appearance, were found in the possession of a person six months after the commission of the dacoity, such possession was not deemed sufficient to call upon the accused to explain his possession.[2]

No doubt the possession of stolen property *immediately* after it has been stolen affords a strong presumption that the person in whose possession it is, is either the actual thief, or a receiver with a guilty knowledge; and this presumption is, of course, strengthened, if the person, in whose possession the stolen property is, fails to give a satisfactory account of the manner in which he acquired such possession, or gives a false account, or gives accounts which are contradictory, or if the property is secreted. But the possession of stolen property, even if accompanied by a failure to give an account as to how such possession was acquired, or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise not a violent or strong presumption, but a probable presumption merely.[3]

"But to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt."[4]

Illustration (b).—An accomplice is one concerned with another or others in the commission of a crime.[5] An accomplice is one who is a guilty associate in crime. Where the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused, he is an accomplice.[6] Where the accomplice is not really a criminal but a spy or informer his evidence does not require any corroboration.[7]

1 *Emperor* v. *Hari Maniram*, (1904) 6 Bom. L. R. 887, 893. See *Satya Charan Manna* v. *Emperor*, (1924) 52 Cal. 223.

2 *Emperor* v *Sughar Singh*, (1906) 29 All. 138; *Nga Yauk* v. *Queen-Empress*, (1885) S. J. L. B 366

3 *Ina Sheikh* v. *Queen-Empress*, (1885) 11 Cal 160, 163

4 Best, 12th Edn., s. 212, p. 197.

5 Wharton.

6 *Ramaswami Gounden* v. *Emperor*, (1903) 27 Mad. 271, 277.

7 *Queen-Empress* v. *Bastin*, (1897) P. J. L B. 365, contra *Mi The U.* v. *Queen-Empress*, (1881) S. J. L. B. 146.

In point of law an accomplice is a competent witness against an accused person (*vide* s 133) But great caution in weighing his testimony is dictated by prudence and reason. In England it is regarded as the settled course of practice not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice.[1] The corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.[2] See comment on s 133, *infra*.

Illustration (c).—The presumption on which this illustration is founded is in accordance with the maxim *omnia præsumuntur rite esse acta, i e*, all things are presumed to be done in due form The principle of the maxim is, in many cases, recognised in support of the solemn *acts* of even *private* persons. For instance, "if an act can only be lawful after the performance of some prior act, due performance of that prior act will be presumed. Again, although in the case of contracts not under seal, a consideration must in general be averred and proved, yet *bills of exchange* and promissory notes enjoy the privilege of being presumed, *prima facie*, to be founded on a valuable consideration The law raises this presumption in favour of these instruments, because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they are executed."[3]

Sections 118 and 119 of the Negotiable Instruments Act lay down certain other presumptions.

The explanation to this illustration speaks of "a man of business," which in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade.[4]

Where the parties are the debtor and a money-lender a Court may presume that the debtor did not give a free consent to the terms of an agreement between them, when such presumption is not inconsistent with the other facts disclosed.[5]

Illustration (d).—This illustration is founded on the presumption which exists in favour of continuance or immutability.

"It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either direct or circumstantial. Thus, where seisin of an estate has been shown, its continuance will be presumed; as also will that of the authority of an agent."[6]

1 *R.* v *Gallagher*, (1875) 13 Cox 61
2 *Rex* v. *Baskerville*, [1916] 2 K, B. 658.
3 Taylor, 11th Edn, s, 148, p. 149
4 *Ningawa* v *Bharmippa*, (1897) 23 Bom. 63, 66.
5 *Ramdhan* v. *Jiwan Khan*, (1870) P. R. No 110 of 1870
6 Best, 12th Edn, s. 405, p. 345.

The ordinary legal presumption is that things remain in their original state [1]

Sections 107-109 deal with particular applications of the principle of which this illustration is the general expression.

Illustration (e).—The rule embodied in this illustration flows from the maxim *omnia præsumuntur rite et solemniter esse acta, i.e.*, all acts are presumed to have been rightly and regularly done. "The true principle intended to be conveyed by the rule, *omnia præsumuntur rite et solemniter esse acta,...* seems to be, that there is a general disposition in Courts of Justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy."[2]

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done. If, for example, publication of a notice was essential under an Act in order to bind a person, such publication must be distinctly proved.[3]

If an official act has been proved to have done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence, and the proof of which is essential to the plaintiff's case [4]

Where a person was tried for and convicted of a breach of certain by-laws purporting to have been duly passed by the Municipal Board, it was held that the presumption was that such by-laws had been passed with due regard to the necessary procedure and were [illegible] their valid- [illegible] appellate or [illegible] the question whether such rules had been properly framed in accordance with the provisions of the law on that subject.[5]

Entries in Collector's book are presumed to be correct having regard to ills. (*e*) and (*f*).[6]

See ss. 79-86 as to the presumptions of this kind in respect of documents.

1 *Mussumat Jariut-ool-Butool* v. *Mussumat Hoseinee Begum*, (1867) 11 M. I. A. 194, 209.

2 Best, 12th Edn., s. 353, p. 312.

3 *Ashanullah Khan Bahadur* v. *Trilochan Bagchi*, (1886) 13 Cal. 197.

4 Per Woodroffe, J., in *Narendra Lal Khan* v. *Jogi Hari*, (1905) 32 Cal 1107, 1121.

5 *Queen-Empress* v. *Ram Chandar*, (1897) 19 All. 493.

6 *Mahomed Solaiman* v. *Birendra Chandra*, (1922) 50 Cal. 243.

Illustration (f) —The illustration leaves it to the discretion of the Court to presume that a common course of business has been followed; but the Court is not bound to presume it.[1]

"Many presumptions are drawn from the usual course of business in public offices With regard to the course of the post,...if a letter is put into a post office, that is *prima facie* proof, until the contrary appears, that the party to whom it is addressed received it in due course."[2]

[illegible]

man, it is presumed that it reached its destination at the regular time, and was received by the person to whom it was addressed."[3]

A person in answer to a claim for arrears of taxes by a Municipality alleged that the taxes were illegal because no notice had been given by the Municipality to the Commissioners. It was held that he must prove the defence and in the absence of such proof the Court will presume that the Municipality had used the regular procedure and that the common course of business had been followed in the particular cases.[4]

The effect to be given to the word "refused" on a registered cover as proof of tender of the packet to the addressee is one of fact and will depend upon the circumstances of each case.[5]

See ss. 16 and 32 (2).

[illegible] presumption whic[illegible] spoliation or fabri[illegible] withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party though it is less violent than that which attends spoliation. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence, if produced, would operate against him.[6]

[illegible] e-

tody.[7]

[1] Per Oldfield, J., in *Ram Das Chakarbati* v. *The Official Liquidator, Cotton Ginning Company, Ltd., Cawnpore*, (1887) 9 All 366, 376.

[2] Best, 12th Edn, s. 403, p. 344.

[3] Taylor, 11th Edn, s. 179, pp. 172-173.

[4] *Municipality of Sholapur* v. *Sholapur Spinning and Weaving Company*, (1895) 20 Bom. 732.

[5] *Gopal* v. *Krishna*, (1901) 3 Bom. L. R. 420.

[6] Woodroffe and Ameer Ali, 8th Edn., p 781.

[7] *Sooriah Row* v. *Cotaghery Boochiah*, (1838) 2 M. I. A. 113, 125.

Where the plaintiff cited witnesses and, when they appeared, declined to have them examined, it was held that the inference not unfairly to be drawn from this conduct was that those witnesses, on examination and cross-examination, would have deposed to a state of facts exactly that set up in the defendant's answer.[1]

The presumption laid down in this illustration was held to apply to the case of counsel engaged in a suit who should not have been, under the circumstances, counsel but should have been called as a witness.[2]

Illustration (h).—Refusal to answer a question is a legitimate

Illustration (i).—This presumption is founded on the natural supposition that a man will protect his own interests by securing his bond before or at the time of discharging it. Where the instrument of a debt and the security for that debt are found in the hands of the debtor, the *prima facie* presumption is that the debt has been discharged.[3]

In a suit on a bond for money, plaintiff alleged that his non-

was on the defendant to prove payment, either by the production of the bond, or other evidence or by both.[4]

In a suit for money due on a mortgage bond, the plaintiff produced only a copy of the document, alleging in his plaint that it had been lost. The defendant admitted its execution, but alleged that the debt had been discharged: and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt. The Subordinate Judge, relying on this section, put the onus on the plaintiff, who, to account for the possession of the bond by the defendant, set up a case supported by witnesses which both Courts below held to be false. The Subordinate Judge dismissed the suit. The Judges of the Judicial Commissioner's Court disbelieved the evidence on both sides, set aside the presumption under this section, and endeavoured to make out a case for the plaintiff based on a theory of their own. The Privy Council held (reversing that decision) that the first Court was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still out-

[1] *Rajah Nilmoney Singh Deo v. Ramanoograh Roy*, (1867) 7 W. R. 29, 30; *Sava Pa v. Maung Lu Gale*, (1897) 2 U. B. R. (1897-1901) 396.

[2] *Weston v. Peary Mohan Dass*, (1912) 40 Cal. 398.

[3] *Bhog* **Hong** *Kong v. Ramanathan C'* (1902) 29 C 4 Bom. L. c.

[4] *Chuni* v. *Udai* (1883) 6 ; *Aung Hla Mat*, (1' L. B R.

standing; and that the appellate Court should not have disregarded the presumption under this section in favour of a "possibility" based on surmise.[1]

Where plaintiff sued for money due upon *hundis* (promissory notes) but alleged their loss, whilst defendant admitted execution but pleaded payment and subsequent destruction of the documents, it was held that failing production of the *hundis* by the defendant there is no presumption that the *hundis* have been discharged.[2]

[1] *Muhammad Mehdi Hasan Khan v. Mandir Das*, (1912) 34 All. 511, 14 Bom. L. R. 1073, P. C.

[2] *Dhian Singh v. Gurdit Singh*, (1925) 6 Lah. 297.

CHAPTER VIII.

ESTOPPEL.

115. When one person[1] has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief,[2] neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Estoppel

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

COMMENT.

Estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.[1]

Estoppel differs from presumptions. An estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts: whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them.[2]

Estoppel is that species of *præsumptio juris et de jure*, where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act [illegible]ne: it is in truth a kind of *argumentum ad hominem*. Hence it [illegible] that 'estoppels' must not be understood as synonymous [illegible] by [illegible] ant [illegible] on- [illegible] rty, [illegible] common or statute law.[3]

[1] [illegible] v. *Gopal Chunder*, [illegible] I. A. 203, 215, 216.

[2] Stephen, 175.

[3] Best, 12th Edn., s. 533, p. 463.

usually *binding upon parties and privies.* Lord Coke has divided privies into three classes; first, privies in blood, as heirs; secondly, privies by estate, as feoffees, lessees, assignees, etc.; and thirdly, privies in law, " as the Lord by escheat, the tenant by the courtesy, the tenant in dower, the incumbent of a benefice," husbands suing or defending in right of their wives; executors and administrators. In all these and the like cases, the law,—acting upon the wise principle, *qui sentit commodum, sentire debet et onus*,—provides that the privy shall stand in no better position than the party through whom he derives his title; but that, if the latter is not at liberty to contradict what he has formerly said or done, the former shall be subject to a like disability.[1]

Estoppel applies not only in favour of the person induced to change his position, but of a transferee from such person, and it binds not only the person whose representations or actings have created it, but all persons claiming under or through him by gratuitous title [2]

Kinds of estoppels.—There are different kinds of estoppels: (1) estoppels by matter of record; (2) estoppels by deed; and (3) estoppels *in pais*.

Estoppel by record.—Estoppel by record results from the judgment of a competent Court. The law allows a party ample opportunity, by way of appeal and otherwise, of upsetting a wrong decision. And if he takes the opportunity and fails, or does not choose to avail himself of it, he cannot subsequently reopen or dispute that decision. And not only the parties themselves, but also the heir, executor, administrator, and assign of each of them are bound by the decision, for they are ' privy to the estoppel.'

Estoppel by matter of record is chiefly concerned with the effect of judgments and their admissibility in evidence, and this kind of estoppel is dealt with by ss. 11 to 14, Civil Procedure Code, and ss. 40-44 of the Indian Evidence Act.

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the *forum* in which it was pronounced, *i.e.*, upon the question whether it was a judgment of a domestic or foreign Court. The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record pu[illegible] declare rights and duties, its material recitals import ab[illegible] between [illegible] parties to it

1 Taylor, 11th Edn., s. 90, p. 95.

2 *Raj Kumar Jagannath Prashad* v. *Syed A*[illegible], 20 [illegible] L. R. 851.

and those who claim under them. The estoppel arising from or fixed by *the fact enrolled constitutes the estoppel of a* judgment. And to the question whether the judgment necessarily creates an estoppel, the general answer is, yes, if it results in *res judicata* : no, if it does not [1]

Estoppel must be distinguished from *res judicata*. Estoppel is part of the law of evidence and proceeds upon the equitable principle of altered situation, while the doctrine of *res judicata* belongs to procedure and is based on the principle that there must be an end to litigation. The plea of *res judicata* prohibits the Court from en-

altered his position; *res judicata* ousts the jurisdiction of the Court, while estoppel only shuts the mouth of a party.[2]

Estoppel by deed.—A deed is the most solemn and authentic

A party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. Both parties and all claiming through or under them, are bound by the language of the deed. But where the recitals in a deed are obviously the statement of one party alone, he and his privies alone will be estopped by them.

The doctrine of English law as to estoppel by deed does not apply to written instruments in India. Deeds and contracts in this country are to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.[4] The art of conveyancing in this country is of so simple and informal a character, that estoppel by deed has been expressly discountenanced by Courts.

Estoppel in pais.—Estoppel by conduct was formerly called " estoppel *in pais* " (*i.e.*, in the contrary), or more fully " estoppels *in pais dehors* the instrument " (*i.e.*, with regard to matters outside a record or deed). This class of estoppel obviously stands on a very different ground from the two preceding ones. To raise an estoppel by conduct, a person must by word or conduct induce another to

a representation were allowed to prove the true facts—to tell the

[1] Bigelow, 375-79; Woodroffe and Ameer Ali, 8th Edn. p 818.

[2] *Casamally* v. *Sir Currimbhai*, (1911) 13 Bom. L. R. 717; Amir Ali, p. 785.

[3] Blackstone, Vol. II, p. 295

[4] *Ram Lal Sett* v. *Kanai Lal Sett*, (1886) 12 Cal. 663, 679; *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*, (1856) 6 M. I. A. 393, 411.

truth—the other person would be prejudiced. If these two conditions are fulfilled, then the person making the representation will not be allowed to deny its truth in any action between him and the person to whom he made it or the persons who claim in the same right. But in any other action he can deny its truth. The ways in which a person may make such a representation are infinite. He may speak or write, act or omit to act, or act negligently.

Estoppel *in pais* arises (1) from agreement or contract; and (2) from act or conduct of misrepresentation which has induced a change of position in accordance with the intention of the party against whom the estoppel is alleged. Estoppel *in pais* is dealt with in ss 115 to 117 Sections 116 and 117 are instances of estoppel by contract, *viz.*, that of the tenant, the licensee, the bailee and the acceptor of a bill of exchange. But the distinction between estoppel by contract and estoppel by conduct is not preserved in the Evidence Act The sections relating to estoppel in the Evidence Act

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variety, and are by no means confined to the subjects which are dealt with in ss. 115 to 118. A man may be estopped not only from

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As to other instances of estoppel see ss 98, 108, 234, 245 and 240 of the Indian Contract Act; s. 18 of the Specific Relief Act; and ss. 41 and 43 of the Transfer of Property Act.

Section 115 is founded upon the doctrine laid down in *Pickard* v. *Sears*[3] namely, that where a person by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own

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land, or what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, *and upon the faith of such* promise or expectation *with the* knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to

[1] *Rub Chand Ghosh* v. *Sarveswar Chandra Chandra*, (1906) 33 Cal 915. There are decisions which lay down that these sections are exhaustive; see *Asmatunnessa Khatun* v. *Harendra Lal Biswas*, (1908) 35 Cal. 904.

[2] *Ganges Manufacturing Co.* v. *Sourujmull*, (1880) 5 Cal. 669.

[3] (1837) 6 A. & E. 469, 474.

[4] *Municipal Corporation of Bombay* v. *Secretary of State*, (1904) 29 Bom. 580, 7 Bom. L. R. 27

give effect to such promise or expectation. The Crown too comes within the range of this Equity.[1]

Scope.—To bring a case within the scope of this section three things are necessary, *viz.*:

(1) there must have been a declaration, act or omission, which amounts to an intentional causing or permitting belief in another;

(2) there must have been belief on the part of that other; and

(3) there must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission actually caused another to act on the faith of it, and to alter his former position.

1. 'Person.'—Whether a minor is a 'person.'—There is a difference of opinion on the question whether the provisions of estoppel apply to minors. The Bombay High Court has laid down that the exception of an infant is not made in this section. It has therefore held that a minor who representing himself to be of full age sold certain property by a registered sale-deed which contained a recital that he was twenty-two years of age was estopped from suing to set aside the sale on the ground of his minority.[2] Following this decision in a subsequent case the Court said: "We are not prepared so to construe the meaning of 'a person' in s. 115 as to exclude from its connotation all persons declared under the Indian Contract Act incompetent to contract." In this case defendant No. 2, who did not look a minor, represented to the plaintiff and intentionally caused her to believe that he was a major and sold to her his house. When the plaintiff sued to recover possession of the house, he pleaded minority. It was held that the defendant No. 2, being a person within the contemplation of this section and having by direct declaration intentionally caused the plaintiff to believe that he was a major, was precluded absolutely from denying the truth of the assertion.[3] The defendant, who was nineteen years of age and had a guardian appointed by the Court, borrowed money by passing a

inquiries as to the age of the minor and has not been deceived by what the minor has told him, then the minor is not estopped from pleading his minority.[5]

[1] *Municipal Corporation of Bombay* v. *Secretary of State*, (1904) 7 Bom. L. R. 27, 29 Bom. 580.

[2] *Ganesh Lala* v. *Bapu*, (1895) 21 Bom. 198.

[3] *Dadasaheb Dasrathrao* v. *Bai Nahani*, (1917) 19 Bom. L. R. 561, 565, 41 Bom. 480.

[4] *Jasraj* v. *Sadashiv*, (1921) 23 Bom. L. R. 975, 46 Bom. 137.

[5] *Gurushiddswami* v. *Parawa Dundaya*, (1919) 22 Bom. L. R. 49.

The Lahore High Court has held that a minor is estopped from

does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy."[4] But the course of decisions in Calcutta is not uniform.[5] A minor, who representing him-

fact, it was held that there was misrepresentation and legal fraud on his part, and he was estopped from taking advantage of his minority to show that the conveyance by him was inoperative.[7] In a later case it laid down that the law of estoppel must be read subject to other laws such as the Indian Contract Act and a minor cannot be made liable upon a contract by means of an estoppel.[8] *Surendra Nath's case* was distinguished on the ground that there was fraudulent misrepresentation on the part of the minor. According to Calcutta decisions, where there is fraud there can be an

that whether or not the entered into by a minor, where persons who are in fact under age, by false and fraudulent misrepresentation as to their age induce others to purchase property

1 *Wasinda Ram* v. *Sita Ram*, (1920) 1 Lah. 389

2 *Dhurmo Dass Ghose* v. *Brahmo Dutt*, (1898) 25 Cal 616

3 *Brohmo Dutt* v. *Dharmo Das Ghose*, (1898) 26 Cal. 381.

4 *Mohori Bibee* v. *Dharmodas Ghose*, (1903) 30 Cal. 539. 545; 5 Bom. L. R. 421, 424, P. C.

5 See *Ram Ratun Singh* v. *Shew Nandan Singh*, (1901) 29 Cal. 126.

6 *Ibid*

7 *Surendra Nath Roy* v. *Krishna Sakhi Dasi*, (1911) 15 C. W. N. 239.

8 *Golam Abdin Sarkar* v. *Hem Chandra Majumdar*, (1915) 20 C. W. N. 418

from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold. Banerji, J., observed in this case: "I do not....deem it necessary to express any opinion on the point although it seems to me to be difficult to hold that in no case would the doctrine of estoppel be applicable to infants" Richard, J, however, said: "In my opinion the ordinary law to estoppel does not apply to infants and this was practically admitted in the argument."[1] Subsequently the same Court held that the defendant who had misrepresented his age was not estopped from pleading his minority in a suit upon his promissory note.[2]

The Madras High Court has held that the statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. Where a minor has obtained money by misrepresenting his age that amounts to fraud and he may be made to refund it, but, in the absence of fraud, a refund cannot be ordered.[3]

Under the English law a minor is not estopped from pleading his minority. An infant by fraudulently representing that he was of full age induced the plaintiffs to lend him a sum of money. In an action by the plaintiffs to recover the money it was held that the cause of action was in substance *ex contractu*, that the plea of infancy was a good answer to the action, and that the defendant was under no equitable liability to the plaintiffs.[4] "When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud."[5] This case has been approved of by the Privy Council.[6] The opinion of the Bombay and Lahore High Courts militates against this view.

2. **'Intentionally caused or permitted another person to believe a thing to be true and to act upon such belief.'**—The words refer to the belief in a fact and not in a proposition of law.[7] "Believe a thing to be true," *i.e.*, believe a fact to be true. The word 'thing' means fact.[8] It must be found that the defendant by his act or

[1] *Jagar Nath Singh* v. *Lalla Prasad*, (1908) 31 All. 21, 26, 34.

[2] *Kanhai Lal* v. *Babu Ram*, (1910) 8 A. L. J. 1058; *Kanhaya Lal* v. *Girdhari Lal*, (1912) 9 A. L. J. 103; *Radhe Shiam* v. *Behari Lal*, (1918) 40 All 558.

[3] *Vaikuntrama Pillai* v. *Authimoolam Chettiar*, (1914) 38 Mad. 1071.

[4] *Leslie Ltd.* v. *Sheill*, [1914] 3 K. B. 607.

[5] *Ibid*, p. 618.

[6] *Mahomed Syedol Ariffin* v. *Yeoh*, (1916) 43 I. A. 256; 19 Bom. L. R. 157, P. C.; [1916] 2 A. C. 575; followed in *Muliabai* v. *Garud*, (1919) 15 N. L. R. 149.

[7] *Rajnarain Bose* v. *Universal* [illegible]

omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. It is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendant had acted. *It must be found that the plaintiff would not have acted* as he did.[1]

This section does not apply to a case in which a belief has not been initially caused, but when otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised. A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase, although the former had, as pleader for the vendors, actively defended the suit. If, however, the purchaser had allowed the vendors to remain in possession intending to mislead the plaintiffs who, having been so misled, had sued them, the decree in suit would bind him on the ground of fraud.[2] To petition for the postponement of a sale in execution of a decree is not intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree [illegible]

Future promise does not create an estoppel.—To create an estoppel there must be a representation by means of a declaration, act or omission that a thing is true, *i e*, that the representation is as to some state of facts alleged to be at the time actually in existence. If the representation relates to promises *de futuro*, it can be binding not as an estoppel but as a contract.[4] A mere promise to do something in future will not create an estoppel.[5]

True facts known to both the parties.—The section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties.[6] A tenant holding over after the expiry of his original lease, received from his landlord notice to quit at the end of the following month. In reply thereto he wrote a letter which contained *inter alia* an admission that he was a monthly tenant. At the hearing of a suit in ejectment filed thereafter by the landlord,

[1] *Narsingdas* v. *Rahimanbai*, (1904) 28 Bom. 440, 6 Bom. L. R. 440; *Jhinguri Tewari* v. *Durga*, (1885) 7 All 878, F. B

[2] *Joy Chandra Banerjee* v. *Sreenath Chatterjee*, (1904) 32 Cal. 357.

[3] *Mina Kumari Bibee* v. *Jaga Sattani Bibee*, (1883) 10 Cal 220.

[4] *Jethabhai* v. *Nathabhai*, (1904) 28 Bom. 399, 407.

[5] *Ma Pyu* v. *Maung Po Chet*, (1916) 2 U. B. R (1914-1916) 148.

[6] *Honapa* v. *Narsapa*, (1898) 23 Bom. 406; *Mohori Bibee* v. *Dharmodas Ghose*, (1903) 5 Bom. L. R. 421, 30 Cal. 539, P. C.; *Ranchhodlal* v. *Secretary of State*, (1910) 13 Bom. L. R. 92, 35 Bom. 182.

the tenant relied on ss. 106 and 16 of the Transfer of Property Act and contended that, his original lease being for manufacturing purposes, he had in fact held over on a tenancy from year to year, and was, therefore, entitled to six months' notice. It was held that he was not estopped from so contending inasmuch as (a) the facts affecting the tenancy were within the knowledge of both parties, and (b) although the language of this section extended to the encouragement of an erroneous belief, the landlord had already given notice to quit and had not been able to show that he had altered his position by reason of the tenant's subsequent admission.[1]

There can be no estoppel if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of the preceding declaration.[2]

Estoppel does not require fraudulent intention.—In *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[3] the Judicial Committee observed that the section " does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act ; but even if they had the power of thus virtually interpolating words in the statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act ; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under

[1] *Jacks & Co.* v. *Joosab Mahomed*, (1923) 48 Bom. 38, 25 Bom. L. R. 1170.

[2] *Jagarnath Prasad* v. *Jaikishun Prasad*, (1916) 1 P. L. J. 16.

[3] (1892) 20 Cal 296, 310, P. C., overruling *Ganga Sahai* v. *Hira Singh*, (1880) 2 All. 809, F. B., *Vishnu* v. *Krishnan*, (1883) 7 Mad. 3.

error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell), with the full con-

Cairncross v. *Lorimer* :[1]

nd, I believe, in the laws

by words or by conduct

has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others

of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.'"

It is not essential that the person making the representation which induces another to act must be influenced by a fraudulent

the original statement may have been made fraudulently, but a fraudulent intention is by no means necessary to create an estoppel. The determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it.[2] "An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel."[3] There may be statements made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterised as misrepresentation, but which amount to estoppel.[4]

[1] (1860) 3 Macq. H. L. C. 827, 829.
[2] *Cairncross* v. *Lorimer*, (1860) 3 Macq. H. L. C 827.
[3] Per Lord Esher in *Seton* v. *Lafone*, (1887) 19 Q. B. D. 68, 70.
[4] *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 20 Cal. 296, P. C.

The existence of estoppel does not depend upon the motive, or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake or misapprehension [1]

Estoppel must be unambiguous.—To create an estoppel against a party, his declaration, act or omission must be of an unequivocal and unambiguous character.[2] An estoppel, to have any judicial value, must be clear and non-ambiguous; it must also be free, voluntary and without any artifice.[3]

Estoppel on a point of law.—Estoppel refers to a belief in a fact and not in a proposition of law. A person cannot be estopped for a misrepresentation on a point of law. An admission on a point of law is not an admission of a " thing " so as to make the admission matter of estoppel [4] Where persons merely represent their conclusions of law as to the validity of an assumed or admitted adoption, there is no representation of a fact to constitute an estoppel.[5]

A party is not bound by his pleader's admission on a point of law.[6]

No estoppel against a statute.—The principle of estoppel cannot be invoked to defeat the plain provisions of a statute.[7] There is no estoppel against an Act of Legislature.[8] Estoppel only applies to a contract *inter partes*, and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act.[9]

Estoppel by remaining silent.—When silence is of such a character and under such circumstances that it would be fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel.[10] A man is bound to speak out in certain cases, and his very silence becomes as expressive as if he has openly consented to what is said or done and had become a party to the transaction.

1 *Pickard* v. *Sears*, (1837) 6 A. & E. 469.

2 *Gajanan* v. *Nilo*, (1904) 6 Bom. L. R. 864

3 *Mowji* v. *National Bank of India*, (1900) 2 Bom. L. R. 1041; *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*, (1874) 13 Beng. L. R 312, P. C.

4 *Jagwant Singh* v. *Silan Singh*, (1899) 21 All. 285

5 *Dhanraj* v. *Soni*, (1925) 27 Bom. L. R. 837.

6 *Narayan* v. *Venkatacharya*, (1904) 28 Bom. 408; 6 Bom. L. R. 434; *Krishnaji* v. *Rajmal*, (1899) 24 Bom. 360; 2 Bom. L. R. 25.

7 *Jagadbandhu Saha* v. *Radha Krishna Pal*, (1909) 36 Cal. 920; *Abdul Aziz* v *Kanthu Mallik*, (1910) 38 Cal. 512.

8 *Shridhar* v. *Babaji*, (1914) 16 Bom L. R. 586.

9 *Barrow's case*, (1880) 14 Ch. D 432, 441; *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti*, (1895) 19 Mad 200.

10 *Jakhomull Mehera* v. *Saroda Prosad Dey*, (1908) 7 C. L. J. 604; *Dhanpat Rai* v. *Guranditta Mal*, (1921) 2 Lah 258.

This section does not apply to a case in which a belief otherwise caused has been only allowed to continue by reason of any omission on the part of the person against whom the estoppel is sought to be raised.[1]

Estoppel by a recital in a deed.—A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it But it is no more evidence as against third persons than any other statement would be.[2]

In a registered sale-deed it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all title-deeds relating to the property sold. The vendor subsequently mortgaged the property to the plaintiff, who had no knowledge that the full amount of the consideration money was not paid, though he knew that the vendor was in possession of a portion of the property. It was held that the defendant was estopped from contending that she had a lien on the property sold for unpaid balance of the purchase money by her acknowledgment of the receipt of the full amount of consideration money and by her act of handing over the title-deeds.[3]

Estoppel by attestation.—Though the mere attestation of a deed by a relative does not necessarily import concurrence, yet where it is shewn by other evidence that when becoming an attesting witness, he must have fully understood what the transaction was, his attestation may support the inference that he was a consenting party. The question whether attestation of a document should be held to imply assent is a question of fact which has to be determined with reference to the circumstances of each case[4] The Privy Council has held that attestation of a deed does not by itself estop the person attesting from denying that he knew of its contents or that he consented to the transaction which it effects.[5]

If A, with the knowledge that the recital in a sale-deed that the land, thereby conveyed, belongs to B, and is in his (B's) enjoyment as owner, attests the sale-deed executed by B in favour of the plaintiff, he is estopped from setting up thereafter his title to the land, even though he (A) might be the certified purchaser of the same in Court auction.[6]

[1] *Joy Chandra Banerjee* v. *Sree-* [illegible]

No. 207.

[5] *Pandurang* v. *Markendeya Tukaram*, (1921) 49 Cal. 334, 24 Bom. L. R. 557, P. C.

[6] *Kandasami Pillai* v. *Nagalinga Pillai*, (1912) 36 Mad. 564. See *Ma Zet* v. *Maung Gyi Nyo*, (1893) 2 U. B. R. (1892-1896), 379.

Title by estoppel.—The illustration to this section is an example of title by estoppel. An owner of property made a grant therefrom of an annuity to his sister and her heirs, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He paid the annuity and kept possession, and subsequently mortgaged the property representing that it was absolutely his own. He remained in possession and paid the annuity till his sister's death whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession and for arrears of the annuity under the terms of the grant. It was held that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unencumbered, he was bound to give it over to them free from encumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.[1]

Estoppel cannot be pleaded in appeal.—A plea of estoppel should not be given effect to in appeal when it was not suggested in the written statement, nor made one of the issues in the first Court, nor one of the grounds of appeal, and only appears for the f [illegible] In such a case t [illegible] [2]

Estoppel created by accepting a cheque.—Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit, etc., for by entering the sums to the customer's credit, they lead him to suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass-book is only *prima facie* evidence against him. The plaintiff sent a cheque to his bankers to be cashed and credited to his accounts. The bankers, in their usual course of business, initialled the receipt of the cheque in the slip book and also certified the credit of the cheque as in cash in the pass-book before the cheque was actually cashed by them. The cheque was then presented by the bankers for payment, dishonoured by the drawee, whereupon they notified the dishonour to the plaintiff. The plaintiff relying on the entry in the pass-book in the meanwhile delivered a portion of the goods sold by him in consideration of the cheque, and even after the notice of dishonour of the cheque by the bankers continued to deliver the rest of the goods sold. It was held that the bankers were not liable to make good to the plaintiff the amount of the cheque, because

[1] *Radhey Lal* v. *Mahesh Prasad*, (1885) 7 All. 864. See *Ramkrishna* v. *Anusuyabai*, (1923) 26 Bom. L. R. 173; *Mitra Sen* v. *Janki Kuar*, (1924) 26 Bom. L. R. 1134, P. C.

[2] *Narasingdas Tulsiram* v. *Rahimanbai*, (1904) 28 Bom. 440, 6 Bom. L. R. 440.

the plaintiff's conduct, subsequent to the notice of dishonour, showed that the entry in the pass-book by the bankers did not mislead him to any appreciable extent [1]

Estoppel not dealt with in the Act.—The sections dealing with estoppel are not exhaustive. A, who had purchased land from X, brought a suit against B for ejectment, alleging that B was in wrongful possession of his land. A admitted that X had sold the same property previously to B, but contended that B as the Mukhtear of X had obtained possession fraudulently and by undue influence. B alleged that he purchased the property from X previously, ignorant of the fact that she had no title and that in reality P was the true owner. Subsequently B purchased from P. A contended that, even if X had no title, B by reason of having obtained possession from X, was estopped from alleging that A had no title. It was held that X, having no title, the conveyance to A was invalid, [illegible] claimed [illegible] was not [illegible]

CASES.

Submission to a Court.—Where a Court on the application of a decree-holder made an order for execution, and such order was [illegible] n calling in question an order subsequently passed by it, directing him to refund a sum realised under the order for execution.[3]

Mortgagee concealing his lien.—In 1857, R and G mortgaged certain lands to the defendant by a registered deed. In 1870 the defendant obtained a money decree against R and G and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage and obtained possession through the Court. The defendant brought another suit upon his mortgage against R and G. He obtained a decree, and ejected the plaintiff and got possession. The plaintiff filed a suit to recover the lands. It was held that he was entitled to recover, as the defendant by [illegible] full value for the [illegible] By his omission [illegible] Procedure Code [illegible] of the same property, does not apply to a case where there has been

[1] *Mowji* v. *National Bank of India*, (1900) 2 Bom. L. R. 1041.

[2] *Rup Chand Ghosh* v. *Sarveswar Chandra Chandra*, (1906) 33 Cal. 915.

[3] *Govind Vaman* v. *Sakharam Ramchandra*, (1878) 3 Bom. 42. See *Ma Hla Win* v. *Maung Shue Yan*, (1899) 2 U. B. R. (1897-1901) (C. P. C.) 293.

a fraudulent concealment by a judgment creditor of the extent of his judgment-debtor's interest in the property brought by the judgment creditor to sale.[1] A mortgagee who caused the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage lien, was held to be estopped for ever from setting up that lien against the title of a *bona fide* purchaser.[2]

Representation to a Court as to liability to pay interest.—Where a judgment-debtor represented to the Court that he was liable to pay interest as claimed in a *darkhast*, and promised to pay it, and on the strength of that representation he obtained from the Court adjournment from time to time, it was held that he was liable to pay interest although in reality the decree contained no provision as to interest.[3]

Agreement not to prefer an appeal.—After plaintiff had obtained a decree, and under it, in execution, arrested his judgment-debtor, the latter filed a petition in Court agreeing not to prefer any appeal against the judgment obtained by the plaintiff, and the judgment-creditor at the same time agreed to release the judgment-debtor from arrest, and to take payment of the sum decreed to him by instalments An order was passed by the Court, embodying this arrangement The judgment-debtor, in contravention of this arrangement, preferred an appeal. It was held that the judgment-debtor having induced the decree-holder to believe, and having expressly undertaken that he would not prefer an appeal, and having by the representation and undertaking procured his own release from arrest, was estopped from acting contrary to his deliberate representation and undertaking.[4]

Representation that the mortgagor has a right to mortgage the property.—A widow had held *benami* for her husband during his life, property as to which he had executed a deed of gift in her favour. After his death she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the property comprised in the

obtained by the mortgagee. It was held that this section was applicable. The son had represented that the gift gave a right to his mother to mortgage, and consequently neither he nor his representative in estate could be allowed to deny the truth of this representation, intentionally made on his part, which also had been

[1] *Agarchand Gumanchand* v. *Rakhma Hanmant*, (1888) 12 Bom. 678.

[2] *Muhammad Hamid-ud-din* v. *Shib Sahai*, (1899) 21 All. 309.

[3] *Narayan* v. *Raoji*, (1904) 28 Bom 393, 6 Bom. L. R. 417.

[4] *Protap Chunder Dass* v. *Arathoon*, (1882) 8 Cal. 455.

acted on by the mortgagee, and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of the mortgagee's interest, at a sale regularly carried out, would have acquired a valid title to the property, although such purchaser might have been fully aware of all the circumstances [1]

Representation that a lease was permanent.—Where a lessor, being either ignorant of his rights or uncertain of their extent, by his own act or representation creates or induces in the mind of his tenants a mistaken belief that he has a permanent interest in the land and may build thereon, and the tenant, relying upon the act or representation so made, treats his interest as permanent and incurs expense in building which he would not otherwise have done, the owner is estopped from denying the truth of that which he represented [2]

Agreement to abide by the decision of a Commissioner.—In a suit for possession of land, the plaintiffs and defendants, while the case was in the Court of the Munsiff, applied that a pleader might be appointed as Commissioner to ascertain who held the land on either side of the *khal* in dispute, and agreed that, if the plaintiffs were found in possession of such land, they should get a decree; while, if defendant No. 1 was found in possession, the suit should be dismissed. Accordingly, a Commissioner was appointed, and the plaintiff's suit was decreed in accordance with the Commissioner's report. It was held that the agreement between the parties to abide by the decision of the Commissioner on the fact of possession was a valid agreement, and that, when that agreement was given effect to and carried out, it would be inequitable to allow the defendants to resile from it, they were estopped in equity from so doing.[3]

Part payment by a judgment-debtor.—On the day fixed for payment, the judgment-debtor paid a portion of the money and obtained further time from the Court to pay the balance. On the judgment-debtor's tendering the balance on the day fixed by the Court for payment, the decree-holder refused to accept the money. The Court tried the case on the merits and set aside the sale. It was held that the judgment-debtor was bound by the agreement, and that he was estopped from contesting the legality of the sale.[4]

Selling one parcel of land as two.—M, a judgment-creditor, having attached certain land of his judgment-debtor, entered by mistake one parcel thereof in the proclamation of sale as two parcels having different numbers in the list of property to be sold. This

1 *Sarat Chunder Dey* v. *Gopal Chunder Laha*, (1892) 20 Cal. 296, P. C.

2 *Forbes* v. *Ralli*, (1925) 27 Bom L. R. 860, P. C.

3 *Bahir Das Chakravarti* v. *Nobin Chunder Pal*, (1901) 29 Cal. 306.

4 *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya*, (1901) 29 Cal. 577.

parcel was put up for sale and purchased by the decree-holder himself, and was subsequently put up for sale and purchased by T. In a suit brought by T against M to restrain M from entering on the land, it was held that M was estopped by his conduct from setting up his title as purchaser against T.[1]

Executor disputing the will after acting as such.—Plaintiffs, three executors of the will of one A, filed a suit against the defendant, the fourth executor, who was A's son, for the removal of the defendant and for the administration of the estate by the Court. All the executors had obtained probate of the will, but the defendant subsequently repudiated the will and claimed to take the estate of the deceased by survivorship. It was held that the defendant having with full knowledge of his rights accepted the office of executor and taken probate of the will and under its authority collected assets and acted so as to cause *third parties to alter their position*, was estopped from disputing the validity of the will on the dispositions and conditions contained therein.[2]

Finding in a previous suit acts as an estoppel.—The second defendant undertook to pay interest on certain debts of the plaintiff, and, in default, agreed to indemnify the plaintiff against all losses caused thereby. The second defendant having defaulted, the creditor recovered judgment both for principal and interest on the debts, in a suit to which the plaintiff and second defendant were parties, the Court finding that second defendant's plea of payment of interest was false. In a suit by the plaintiff for recovery of damages against the second defendant, on account of the latter's default in payment of the stipulated interest, the second defendant again pleaded payment. It was held that the second defendant was equitably estopped, by reason of the finding in the previous suit, from raising the contention that he had really paid the interest due to the creditor.[3]

Trustee mortgaging the trust property as his own cannot dispute the sale by mortgagee.—A trustee, alleging that the trust property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustees for the sale of the land, and the land was sold in execution of that decree. The trustee consequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. It was held that the plaintiff was estopped by his conduct from recovering possession of the land.[4]

[1] *Tinnappa* v. *Murugappa*, (1883) 7 Mad. 107.

[2] *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*, (1906) 29 Mad. 239.

[3] *Nallappa Reddi* v. *Vridhachala Reddi*, (1911) 37 Mad. 270.

[4] *Gulzar Ali* v. *Fida Ali*, (1883) 6 All. 24.

A having obtained a decree against B for pre-emption of certain land conditional on payment of the price within a specified time, mortgaged the land to B, and in consequence of this transaction did not pay the price on the due date into Court for payment to B. He subsequently sued for redemption. B pleaded that A lost his right of pre-emption by reason of non-payment of price within the time fixed in the decree, and that he was not entitled to mortgage the land, not having completed his title as proprietor It was held that B was estopped from raising this plea. By his accepting the mortgage by A, he caused A to believe that he was proprietor of the land and to act on that belief by not paying the money into Court by the specified date.[1]

Profession of Mahomedanism.—In a suit for a divorce from a Mahomedan husband, brought by a Burmese woman professing the Buddhist faith, but at the time of her marriage, simulating conversion to Islam, and married with Mahomedan ceremonies, it was held that the Mahomedan law should form the rule of decision; and that the Courts could not grant a divorce in such a case when no fault was established on the husband's side.[2]

Settlement of accounts.—A party obtained a settlement of mutual accounts on favourable terms on the understanding that it was a final arrangement, and subsequently sued for an item as omitted, being the balance due on a document which ought to [illegible] not produced by him either [illegible] held that he was estopped [illegible] ded everything unless he [illegible] on his side [3]

Family arrangement.—By a family arrangement between the children of the same mother by different fathers the income of the land in suit was divided into three equal shares among the representatives of the three different branches of the family, and this arrangement had lasted for upwards of thirty years The plaintiff now sued for the whole of the property as descended from her father alone. It was held that the plaintiff was estopped by the family compact from claiming more than a third share.[4]

Adoption.—In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sradha* ceremony

[1] *Gulrang* v. *Vasua*, (1890) P. R. [illegible] No. 131 of 1890.
[2] *Kumal Sheriff* v. *Mu Shwe Ywet*, (1875) S. J. L. B. 49.
[3] *Dawoodji Bamji* v. *C. P. L.*

of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. It was held that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void.[1] A childless Hindu widow agreed with the plaintiff's father to adopt the plaintiff, stating that her husband had given her authority to adopt. Subsequently she adopted the plaintiff and had his thread-ceremony performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about eighteen months, when she repudiated the adoption and refused to maintain the plaintiff. It was held that the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of eighteen months. In order that an estoppel by conduct may raise the invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must have become so altered that it would be impossible to restore him to it.[2]

No estoppel.—A son, against whom a suit ought to have been [illegible] uit wrongly brought [illegible] the mother should [illegible] ow that it was by reason of any representation or conduct of the son that the plaintiff was led to think that the mother was the right person to be sued. It was held that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him, from contesting the validity of that decree.[3]

E, being in possession of the documents of *title*, mortgaged land to the plaintiff. E and his father A borrowed money from one R, who obtained a decree against A, and purchased the land at the execution sale. In a suit for foreclosure of the plaintiff's mortgage against E and R, the first Court held that A was the true owner, but the lower appellate Court did not decide whether the plaintiff's mortgage was a valid transaction. It was held, on second appeal, that R acquired the property adversely to A and not as his representative, and th [illegible] m.[4]

Where a landlord [illegible] causes the sale of an occupancy [illegible] he is not

1 *Dharam Kunwar* v. *Balwant Singh*, (1908) 30 All. 549. See *Muhammad Niaz-ud-din Khan* v. *Muhammad Umar Khan*, (1906) P. R. No. 1 of 1907.

2 *Parvatibayamma* v. *Ramakrishna Rau*, (1894) 18 Mad. 145 See *Sirdarni Dharamkour* v. *Randhir* [illegible]

estopped from pleading non-transferability without his consent in a subsequent suit brought by the mortgagee of the occupancy raiyat.[1]

In the year 1871 Government granted to the defendants' predecessor-in-title a certain plot of land situate at Dhandhuka. The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted. This statement was repeated in a mortgage-deed executed by the defendant's predecessor-in-title to the defendants themselves in the year 1893. In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it. Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants' encroachment. The suit was brought in the year 1908. The defendants' plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality, and they wished to lead evidence to prove their plea. It was held that the defendants' title-deeds having brought to their knowledge the title of the Government the doctrine of estoppel was not applicable.[2]

The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed, both believing that they had effected a valid transfer. Possession was taken by each party and defendant began to erect a very costly building placing a wall thereof in the land he had acquired in exchange. While the building was in progress, the plaintiff demanded and obtained Rs. 525 from the defendant on the ground that the plot he parted with was found to be more in extent than the defendant's. After the completion of the building the plaintiff sued the defendant for recovery of his plot after removal of the defendant's building on it. The defendant pleaded that the plaintiff was estopped by his conduct from recovering the plot. It was held that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange as required by ss. 54 and 118 of the Transfer of Property Act.[3]

Estoppel of tenant;

116. No tenant of immoveable property,[1] or person claiming through such tenant, shall, during the continuance of the tenancy,[2] be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy,[3] a title to

[1] *Asmatunnessa Khatun* v. *Harendra Lal Biswas*, (1908) 35 Cal. 904.

[2] *Ranchodlal Vandravandas Patvari* v. *The Secretary of State for India*, (1910) 35 Bom. 182, 13 Bom. L. R. 92.

[3] *Ramanathan Chetty* v. *Ranganathan*, (1917) 40 Mad. 1134.

such immoveable property; and no person who came upon any immoveable property by the license of the person in possession[4] thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.

land of licensee of person in possession.

COMMENT.

The section deals with estoppel (1) of a tenant, and (2) of a licensee of the person in possession

The estoppel of a tenant is founded upon the contract between the tenant and his landlord.

Where a man having no title obtains possession of land under a demise by a man in possession, who assumes to give him a title as tenant, he cannot deny his landlord's title; as, for instance, if he takes for twenty-one years and he finds the landlord has only five years' title, he cannot after the five years set up against the landlord the *just tertii*, though, of course, the real owner can always recover against him. He took possession under a contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a *title*.[1] This is estoppel by contract. The estoppel arises, not by reason of some fact agreed or assumed to be true, but as the legal effect of carry [illegible] execution of the tenant taking possession of [illegible] the lessor.[2]

Th [illegible] he relation of a tenant and that of a licensee in whose case the law itself implies a tenancy and to whom the same principles apply.[3]

Whether a tenant should be in possession of property to estop him from denying his landlord's title.—A Full Bench of the Madras High Court has held that a tenant who has executed a lease but *has not been put into possession* by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion.[4]

The Bombay High Court has held that the section is comprehensive enough to cover all cases of tenancy.[5] In an ejectment suit brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure

[1] Per Jessel M. R. in *In re Stringer's Estate*, (1877) 6 Ch. D. 1, 9.

[2] *Ramandas v. Nilmadhab*, (1916) 44 Cal. 771, 777.

[3] *Doe dem Johnson v. Baytup*, (1835) 3 A. & E. 188.

[4] *Venkata Chetty v. Aiyanna Goundan*, (1916) 40 Mad. 561, F. B.

[5] *Vasudev Daji v. Babaji Ranu*, (1871) 8 B. H. C. (A. C. J.) 175.

and that the present incumbent of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inam rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, had descended to his heirs independently of the Inam and furnished the leasehold or Mirasi right It was held that the defendants' contention involved the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title.[1]

The decisions of the Calcutta High Court are not unanimous on the point. In a case it laid down that the words "at the beginning of the tenancy" in this section only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned and not to cases in which the tenants have previously been in possession. Where, A, a ryot, being in possession of a certain holding, executed a *kabuliat* regarding this holding in favour of B (who claimed the land, in which the holding was included, under a derivative title from the last owner), and paid rent to B thereunder, it was held that A was not estopped by this section from disputing B's title.[2] In a later case it held down that the rule that a tenant is estopped from denying the title of his landlord applies only to the title of the landlord who *lets the tenant in. If the tenant did not obtain possession from* a person who was only recognised as landlord either by express agreement, or by attornment, or formal acknowledgment by payment of rent, he may always show that his conduct was due to mistake or ignorance of facts relating to title, misrepresentation, or fraud. Where, in a suit for rent, the tenant denied the execution of the *kabuliat* propounded by the plaintiffs, pleaded that it was forged and denied payment of rent under it to the plaintiffs, and failed to establish his pleas, it was held that the tenant was not entitled to prove that the plaintiffs were not his landlords, although he had not been inducted into the land by the plaintiffs.[3]

The Allahabad High Court has taken the same view as the Bombay and Madras High Courts. It has held "that once a person is the tenant *of another person he cannot be allowed to deny that* the person whose tenant he was, was the owner when the tenancy was created. He can, no doubt, admit that his landlord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to

[1] *Trimbak Ramchandra* v *Shekh Gulam Zilani*, (1909) 34 Bom. 329, 12 Bom. L. R. 208.

[2] *Lal Mahomed* v. *Kallanus*, (1885) 11 Cal. 519.

[3] *Ketu Das* v *Surendra Nath Sinha*, (1903) 7 C W. N 596.

an end, but he cannot deny that at the commencement of the tenancy the person with whom he entered into the contract was the owner of the property. The words,' at the beginning of the tenancy,' are expressly inserted in the section to show that the tenant is not prevented from showing that after the tenancy commenced the estate of the landlord devolved on some other person."[1]

A tenant who *has been let into possession* cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.[2] A tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title.[3]

1. 'Immoveable property.'—A several fishery is considered immoveable property for the purposes of this section.[4]

2. 'During the continuance of the tenancy.'—A tenant is only precluded, during the continuance of the tenancy, from denying that the landlord had 'at the beginning of the tenancy' a title to the property, the subject of the tenancy. The words of the section leave it open to the tenant to show that his landlord's title has subsequently expired.[5] If the term of lease has expired when a suit is brought, the tenant can dispute the title of the landlord Similarly a tenant is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been, for a period prescribed by the limitation Act, *pro tanto* adverse to the right to evict either at will or on notice given.[6]

3. 'At the beginning of the tenancy.'—These words only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.[7] A, a ryot, [illegible]

and paid rent to B thereunder. It was held that A was not estopped from disputing B's title.[8]

[1] Per Richards, C. J., and Rafiq, J., in *Ganpat Rai* v. *Multan*, (1916) 38 All. 226, 228.

[2] *Bilas Kunwar* v. *Desraj Ranjit Singh*, (1915) 37 All. 557, 567, 17 Bom. L. R. 1006, P. C.

[3] *Ekoba* v. *Dayaram*, (1919) 22 Bom. L. R. 62.

[4] *Lakshman* v. *Ramji*, (1920) 23 Bom. L. R. 939.

[5] *Bala Kushaba* v. *Abai Amrita Vaghmode*, (1909) 11 Bom. L. R. 1093; *Devidas* v. *Shamal*, (1919) 22 Bom. L. R. 149; *Atu Muhammad* v. *Shankar Das*, (1925) 6 Lah. 319.

[6] *Fatesingji* v. *Bamanji*, (1903) 5 Bom. L. R. 274.

[7] *Lal Mahomed* v. *Kallanus*, (1885) 11 Cal. 519.

[8] *Lal Mahomed* v. *Kallanus*, *Ibid*.

4. 'No person who came upon any immoveable property by the license of the person in possession, etc.'—Where it is proved that the occupation by a person of immoveable property is by permission of another, the occupier is estopped from denying the other's title.[1] There is no distinction between the case of a tenant and that of a common licensee. Both are let into possession by the act of the landlord, and the licensee by asking permission admits that there is a title in the landlord, and the law under such circumstance implies a tenancy.[2]

Mortgagor and mortgagee.—As between a mortgagor and his mortgagee neither can deny the title of the other for the purpose of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property.[3]

Benami title.—Where a lease is executed by a tenant in favour of a *benamidar*, the real owner is regarded as the landlord whose title the tenant is estopped from denying under this section. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled A *benamidar* has no right to sue unless he can show a legal right to sue under the general law.[4]

The defendants entered into possession of plaintiff's property by executing a registered *kabuliat*, but no lease was executed In a suit by the plaintiff to recover rent, the defendants pleaded that without a lease there was no contract of tenancy and that the plaintiff was not entitled to recover the rent It was held that in view of the fact that the defendants entered into and continued in occupation of the land with the plaintiff's consent, they could not be heard to say that they were not liable for rent for use and occupation.[5]

CASES.

Where a tenant at fixed rates, who having mortgaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the Zamindar, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejectment, for redemption, it was held that the mortgagee could plead successfully that the mortgagor's interest in the holding had determined by the ejectment of the mortgagor [6]

The plaintiff sued for possession of a certain house, alleging the expiry of the lease (*kabuliat*) on which the defendants held it as tenants. The Mamlatdar dismissed the suit, being of opinion

[1] See *Mah Hit* v. *Maung San Dun*, (1892) P. J L B 4

[2] Per Coleridge, J, in *Doe dem. Johnson* v. *Baytup*, (1835) 3 A. & E 188, 192.

[3] *Hillaya* v *Narayanappa*, (1911) 13 Bom. L. R. 1200

[4] *Kuppu Konan* v *Thirugnana Sammandam Pillai*, (1908) 31 Mad. 461, *Bogar* v *Karam Singh*, (1906) P R No 141 of 1906

[5] *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh*, (1909) 31 All. 276, F B

[6] *Nakchedi Bhagat* v. *Nakchedi Misr*, (1896) 18 All. 329

that the plaintiff had no title to the house when he granted the lease, and that the house belonged to the defendants when they passed the lease. It was held, reversing the decree, that the defendants (tenants) having executed the *kabuliat* could not deny the plaintiff's title as a ground for refusing to give up possession, and the Mamlatdar himself, therefore, could not go into the question.[1]

Estoppel of acceptor of bill of exchange, bailee or licensee

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

COMMENT.

Estoppels in the case of negotiable instruments are instances of estoppel by agreement or contract. See ss. 41 and 42 of the Negotiable Instruments Act.

"The *acceptance* of a bill of exchange is also deemed a *conclusive admission*, as against the acceptor, of the existence of the drawer and the genuineness of his signature, and of his capacity to draw; and if the bill be payable to the order of the drawer, of his capacity to indorse; and if it be drawn by procuration, of the authority of the agent to draw in the name of the principal; . . . and it matters not in this respect, whether the bill be drawn before or after the acceptance."[2]

Under this section an acceptor of a bill of exchange cannot deny that the drawer had authority to draw or endorse it. He may deny that the bill was really drawn by the person by whom it purports to have been drawn. A bailee or licensee cannot deny that his bailor or licensor had, when the bailment or license commenced, authority to make it. But a bailee, if he delivers the goods bailed to a third person, may prove that that person had a right to them as against the bailor.

[1] *Patel Kilabhai Lallubhai* v. *Hargovan Mansukh*, (1894) 19 Bom. 133.

[2] Taylor, 11th Edn., s. 851, p. 574.

The bailee and the licensee are placed in the same position as the tenant in the preceding section. The bailee is protected by the bailor's title so long as any better title is not advanced.

Sections 115, 116 and 117 cover certain well-known cases of estoppel by agreement, but they are not exhaustive of the doctrine of estoppel by agreement.[1] Agents, for instance, are not ordinarily permitted to set up the adverse title of a third person to defeat the rights of their principals.

Forged endorsement.—No person can claim a title to a negotiable instrument through a forged endorsement. Such endorsement is a nullity and must be taken as if no such endorsement was on the instrument [2]

English law.—This section is in accordance with English law, except as to the first explanation under which the acceptor may show that the signature of the drawer is a forgery, while in England he is not allowed to do so on the ground that he is bound to know his own correspondent's signature

In a suit for royalty, brought by the licensors of certain jute trade-marks against the licensees, the defence taken was that the plaintiffs had no title to the marks in question, and that the license was void. It was held that by virtue of this section the licensees were estopped from questioning their licensor's title, or the validity of the license [3]

1 *Rup Chand Ghosh* v *Sarveswar Chandra Chandra*, (1906) 33 Cal 915

2 *Banku Behari Sikdar* v. *Secretary of State for India*, (1908) 36 Cal 239

3 *Hannah* v *Juggernath & Co.*, (1914) 42 Cal. 262.

CHAPTER IX.

OF WITNESSES.

Who may testify

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

COMMENT.

Under this section all persons are competent to testify, unless they are, in the opinion of the Court, unable to understand the questions put to them or to give rational answers to those questions.

1. 'Competent to testify.'—The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under this section, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational and intelligent account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.[1] If a boy in spite of his smallness can both understand questions and give rational answers to them he should be examined.[2]

With respect to children, no precise age is fixed by law, within which they are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must ever depend upon the good

[1] *Queen-Empress* v. *Lal Sahai*, (1888) 11 All 183.

[2] *Queen-Empress* v. *Ram Sewak*, (1900) 23 All. 90

sense and discretion of the Judge In practice, it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding [1]

The Court is not bound, before taking the deposition of a child witness, to ascertain by a preliminary examination whether the child has capacity to understand the questions put to it and to give rational answers to them, but the competency of such a witness may be tested during the course of its examination [2] According to the Bombay High Court when the witness is of tender years the Court should satisfy itself that the witness is competent to testify [3]

There is a conflict of opinion on the question whether the omission to administer an oath or affirmation under the Oaths Act to a witness of tender years renders his evidence inadmissible. According to the Bombay, Calcutta and Patna High Courts such evidence is admissible.[4] The Allahabad High Court has held in two cases that such evidence is inadmissible [5] But it has taken a different view in a later decision in which it lays down that the fact that a Court has advisedly refrained from administering an oath to a witness is not sufficient by itself to render the statement of such witness inadmissible A Court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen and to afterwards inform the Court thereof, and if the Court is so satisfied it is best that the Court should comply with the provisions of s 6 of the Indian Oaths Act in the case of a child just as in the case of any other witness [6] The Madras High Court of late has taken the same view as the Calcutta High Court,[7] though in an earlier case it held that such evidence was not admissible [8] The former Chief Court of Lower Burma held that such evidence was inadmissible [9]

Explanation.—The explanation applies to the case of a monomaniac or person afflicted with partial insanity Such a person will be an admissible witness if the Judge finds him upon investigation capable of understanding the subject with respect to which he is required to testify.[10]

When an accused is a competent witness.—An accused person cannot be a competent witness on his own behalf because under

1 Taylor, 11th Edn, s 1377, p 936

2 *Nafar Sheikh* v *Emperor*, (1913) 41 Cal. 406

3 *Emperor* v. *Hari Ramji*, (1918) 20 Bom L R 365

4 [illegible] *Sahai*, (1888) 11 All. 183.

6 *Emperor* v *Dhani Ram*, (1915) 38 All 49

7 *Re China Venkadu*, (1918) 38 Mad 550.

8 *Queen-Empress* v. *Viraperumal*, (1892) 16 Mad. 105.

9 *Deya* v *King-Emperor*, (1916) 9 L B R. 88.

10 *Regina* v *Hill*, (1851) 2 Den. C. C 254; *Spittle* v. *Walton*, (1871) L R 11 Eq. 420.

s. 342 of the Criminal Procedure Code "no oath shall be administered to the accused." Where there are two accused a Magistrate cannot convert one of them into a witness against the other except when a pardon has been lawfully granted.[1] Where two persons are jointly charged and tried and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can upon such trial be lawfully examined as a witness.[2] Where there are several accused persons, one of whom is a European British subject and claims to be tried by a special Jury, the other accused who are to be tried separately can be competent witnesses in the trial before the special Jury.[3]

CASE.

During the course of a police investigation into a case of house-breaking and theft, several persons were arrested, one of whom made certain disclosures to the police and pointed out several houses which had been broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted. It was held that his evidence was admissible under this section though he had been illegally discharged by the police.[4]

Dumb witnesses

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Parties to civil suit, and their wives or husbands.

Husband or wife of person under criminal trial.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings ag[illegible] any person, the husband or wife of [illegible] person, respectively, [illegible] a com[illegible] witness.

COMMENT.

[illegible]es are competent [illegible] criminal proce[illegible]

P[illegible] can[illegible] gence [illegible] In all qu[illegible]

[1] Queen-Empress [illegible] (1888) [illegible] All. [illegible] (1877) [illegible] [illegible]

[2] [illegible] (1916) [illegible] [illegible]bish v. The K[illegible] [illegible]02) P. R. [illegible]

[3] [illegible] Dez. [illegible] (1871) [illegible] Allalad v. [illegible]dia, (1906) [illegible]

[4] [illegible] The Crown, [illegible]

English law.—In criminal cases a husband and wife are not competent witnesses for or against each other. A husband and wife are [illegible] person or [illegible]

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Judges and Magistrates

Illustrations

(*a*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(*b*) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(*c*) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

COMMENT.

Sections 121-132 declare exceptions to the general rule that a witness is bound to tell the whole truth, and to produce any document in his possession or power relevant to the matter in issue.[1]

T[illegible] privilege.[2] The privilege of the Judge or the Magistrate extends only "to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate."

Judge or Magistrate as a witness.—"A judge, before whom a cause is tried, must conceal any fact within his own knowledge, unless he be first sworn; and consequently, if he be the sole judge, it seems that he cannot depose as a witness, though if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further

[1] *The Queen* v. *Gopal Doss*, (1881) 3 Mad. 271, 277, F. B.

[2] *Empress of India* v. *Chidda Khan*, (1881) 3 All. 573, F.B.

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CASE.

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Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

COMMENT.

[illegible]s are competent witnesses for or against each [illegible] criminal proceedings.

ca. [illegible]
gence [illegible]
In all [illegible]

1 Queen-[illegible] (1888) 11 All [illegible] (1877) [illegible] [illegible]sk v. The [illegible] P. R. [illegible] Alladad v. [illegible]dia, (1906) [illegible] The Crown, (1878) P. R. No. 23 of 1878 (Cr.); [illegible] King-Emperor of India v. Sobha Ram, (1904) P. R. No. 8 of 1904 (Cr.) [illegible]

3 Empress v. Durant, (1898) 23 Bom 213.

4 Queen-Empress v. Mona Puna, (1892) 16 Bom. 661.

English law.—In criminal cases a husband and wife are not [illegible] nd wife are [illegible] person or [illegible]

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

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Illustrations

(*a*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate B cannot be compelled to answer questions as to this, except upon the special order of a superior Court

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(*c*) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Sessions Judge B may be examined as to what occurred.

COMMENT.

Sections 121-132 declare exceptions to the general rule that a witnes[illegible] ment [illegible] that [illegible] If he [illegible] tion, it does not lie in the mouth of any other person to assert the privilege.[2] The privilege of the Judge or the Magistrate extends only "to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate"

Judge or Magistrate as a witness.—"A judge, before whom a cause is tried, must conceal any fact within his own knowledge, unless he be first sworn; and consequently, if he be the sole judge, it seems that he cannot depose as a witness, though if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further

1 *The Queen* v *Gopal Doss*, (1881) 3 Mad. 271, 277, F. B.

2 *Empress of India* v. *Chidda Khan*, (1881) 3 All. 573, F.B.

judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another."[1]

A person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons exercising similar judicial functions sitting with him at the same time.[2]

Where a Judge is a sole judge of law and fact, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court in the presence of the accused.[3] The accused is entitled to have nothing stated against him in the judgment which was not stated on oath in his presence, and which he had no opportunity of testing by cross-examination and of rebutting.[4]
bound to st
he himself
and the prisoner in such situation has a right, if he thought fit, to cross-examine the Judge whose evidence should be recorded and form part of the evidence in the case.[5]

122. No person who is or has been married shall be compelled to disclose any communication[1] made to him during marriage[2] by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication,[3] unless the person who made it, or his representative in interest,[4] consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Communications during marriage

COMMENT.

admiss
disturb
weaken, if not to destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however,

[1] Taylor, 11th Edn., s. 1379, p. 938.

[2] *The Queen* v. *Mookta Singh*, (1870) 13 W. R. Cr. 60.

[3] *Queen-Empress* v. *Manikam*, (1896) 19 Mad. 263; *Empress* v. *Donnelly*, (1877) 2 Cal. 405.

[4] *Girish Chunder Ghose* v. *The Queen-Empress*, (1893) 20 Cal. 857, 866; *Hari Kishore Mitra* v. *Abdul Baki Miah*, (1894) 21 Cal. 920.

[5] *Hurro Chunder Paul*, (1873) 20 W. R. Cr. 76.

limited to such matters as have been communicated ' during the marriage.' "[1]

1. ' Compelled to disclose any communication.'—This expression implies that the party concerned is made or allowed to say or do something by way of disclosing a communication made during marriage.[2] A document, even though it contains a communication *from* a husband to a wife or *vice versa*, in the hands of third persons, is a [illegible]
on [illegible]
cat [illegible]
cation if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made.[3]

2. ' During marriage.'—The protection conferred by this section is limited to such matters as have been communicated during marriage. A communication made to a woman before marriage would not be protected. But the privilege continues even after the marriage has been dissolved by death or divorce

3. ' Permitted to disclose any such communication.'—Even if one of the spouse is willing to disclose a communication, he or she *will not be permitted to disclose it unless* the person who made it or his representative in interest consents, except in suits or prosecutions between married persons

On a trial for the offence of breach of trust by a public servant a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the police, it was held that the letter was admissible in evidence against the accused [4]

4. ' Representativ in interest '—Where there is no " representative in interest " who can consent, under this section, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications The widow of a deceased husband is not his " representative in interest " for the purpose of giving such consent.[5]

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the Department concerned, who shall give or withhold such permission as he thinks fit.

[1] Taylor, 11th Edn., s. 909-A, pp. 617, 618

[2] *Queen-Empress* v. *Donaghue*, (1898) 22 Mad. 1, 4.

[3] *Ibid*, p 3.

[4] *Queen-Empress* v. *Donaghue* (1898) 22 Mad. 1.

[5] *Nawab Howladar* v. *Emperor*, (1913) 40 Cal. 891.

COMMENT.

This section exempts only unpublished official records relating to any affairs of State except with the permission of the head of the Department.

Statements made and documents produced by assessors before income-tax officers for the purpose of showing the income of such assessees do not refer to matters of State, and are not privileged under this section.[1]

124. No public officer shall be compelled to disclose communications made to him in official confidence,[1] when he considers that the public interests would suffer by the disclosure.

Official communications

COMMENT.

The object of this section is to prevent disclosures to the detriment of public interests and the decision as to such detriment rests with the officer to whom the communication is made and does not depend on the special use of the word 'confidential.'[2] Under this section the public officer claiming privilege has to exercise his own discretion in giving or refusing disclosure.[3]

1. **'Communications made to him in official confidence.'**—Communications in official confidence import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. The question whether such communication was made in the course of such performance is for the Court to decide.[4]

the meaning of this section and cannot be used as acknowledgment of any liability mentioned therein.[5]

125. No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Information as to commission of offences

[1] *Venkatachalla Chettiar v. Sampathu Chettiar*, (1908) 32 Mad. 62.

[2] *Nagaraja Pillai v. Secretary of State for India*, (1914) 39 Mad. 304; *Bealson v. Skene*, (1860) 5 H. & N. 838.

[3] *Jehangir v. Secretary of State*, (1903) 6 Bom L. R. 131.

[4] *Nagaraja Pillai v. Secretary of State for India*, sup., p 311.

[5] *Collector of Jaunpur v. Jamna Prasad*, (1922) 44 All. 360

Explanation.—" Revenue-officer " in this section means any officer employed in or about the business of any branch of the public revenue.

COMMENT.

Under this section a Magistrate or a police-officer cannot be compelled to give the source of information received by him as to the commission of an offence. He may, if he likes, disclose the name of the informant.

The accused is not entitled to elicit from individual prosecution witnesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they had received information; but a detective cannot refuse, on grounds of public

objection taken, to exclude such evidence [2]

Professional communication

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil,[1] by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any illegal purpose:

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

[1] *Amrita Lal Hazra* v. *Emperor,* (1915) 42 Cal. 957.

[2] *Weston* v. *Peary Mohan Dass,* (1912) 40 Cal. 898, 920.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a*) A, a client, says to B, an attorney—"I have committed forgery and I wish you to defend me"

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b*) A, a client, says to B, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c*) A, being charged with embezzlement, retains B, an attorney, to defend him In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure

COMMENT.

This section is based upon the principle that if communications to a legal adviser were not privileged, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation. The section not only
cations made to
but is not permi
unless with the express consent of his client.

1. 'To disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, etc.'—Communications protected by this section must be confidential. The word 'disclose' shows that the privileged communication must be of a confidential or private nature.[1] It is not every

learned by observation, *e.g.*, by watching a manufacturing process being carried on, as to what is communicated to him by word of mouth or writing.[3]

The section protects from publicity not merely the details of the business, but also its general purport, unless it be known *aliunde* that such business falls within proviso 1 or 2. A solicitor is not at liberty to disclose the nature of his professional employment.[4] If an

[1] *Framji Bhicaji* v. *Mohansing Dhansing*, (1893) 18 Bom. 263, 272; *Memon Hajee Haroon Mahomed* v. *Molti Abdul Karim*, (1878) 3 Bom. 91; *Emperor* v. *Rodrigues*, (1903) 5 Bom. L R. 122.

[2] *Framji Bhicaji* v. *Mohansing Dhansing*, (1893) 18 Bom. 263.

[3] *Gopi Lal* v. *Lakhpat Rai*, (1918) 41 All. 125.

[4] *Framji Bhicaji* v. *Mohansing*, (1893) 18 Bom 263

made to him by a person, if the same is not made to him in the course and for the purpose of his employment as a pleader: and the fact that the pleader has been acting as a professional adviser to the party, makes no difference [2]

Mukhtear.—The restrictions imposed by this section extend also to communication made to Mukhtears when acting as pleaders for their clients.[3]

Prc. . i. [illegible] under it any c[illegible] ose is not [illegible] be crimin[illegible]

CASES

At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A B, who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. A B was afterwards tried for defamation. At the trial, the solicitor was called as a witness for the prosecution, and was asked (a) the name of his client; (b) the name of the person who accompanied the client and made a statement to him, and (c) the matter in which his client employed him The solicitor declined to answer all the three questions on the ground of privilege It was held that (a) the solicitor was bound to disclose the name of the client; (b) he was bound to disclose the name of the person who accompanied the client and made a statement to him, (c) he was not bound to disclose the matter in which the client employed him

Where defendants at an interview, at which the plaintiff was present, admitted their partnership to their attorney who was then also acting as attorney for the plaintiff, it was held that the attorney was not precluded by this section from giving evidence of his admission to him: first, because the defendants' statements, having been made in the presence and hearing of the plaintiff, could not be regarded as confidential or private, second, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants but to have been addressed to him also as attorney for the plaintiff.

Section 126 to apply to interpreters, etc

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

[1] *In re an Attorney*, (1924) 26 Bom L R 887, F. B.
[2] *Emperor* v *Bala Dharma*, (1902) 4 Bom. L. R 460.
[3] *Abbas Peada* v. *Queen-Empress*, (1898) 25 Cal 736.
[4] *Framji Bhicaji* v. *Mohansing Dhansing*, *sup*
[5] *Mewon Haree Haroon Mahomed* v *Molvi Abdul Karim*, (1878) 3 Bom. 91.

COMMENT.

This section extends the privilege given by s. 126 to interpreters, clerks, or servants of lawyers. It extends to a communication made to a pleader's clerk the same confidential character that attaches to a communication to the pleader direct under s. 126.[1]

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled[1] to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Confidential communications with legal advisers

COMMENT.

This section applies where the client is interrogated, and whether he be a party to the suit or not. If a party becomes a witness of his own accord he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony.[2]

1. 'Compelled.'—This word does not mean subpœnaed. The section uses the words 'compelled to disclose' with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box.[3]

CASE.

Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible

1 *Kameshwar Pershad* v. *Amanutulla*, (1898) 26 Cal. 53

2 See *Muncherskaw Bezonji* v. *The New Dhurumsey S. & W. Company*, (1880) 4 Bom. 576, 581.

3 *Moher Sheikh* v. *Queen-Em* (1893) 21 Cal 392, 400.

face of the affidavit that the documents were prepared or written merely for the use of the solicitor.[2]

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of title-deeds of witness, not a party

COMMENT.

This section is based on the principle that great inconvenience and mischief would result to witnesses if they are compelled to disclose their titles by the production of their title-deeds The object of the privilege is that the title may not be disclosed and examined.

The section protects a witness, who is not a party to the suit in which he is called, from producing—

(1) title-deeds to any property,
(2) any document in virtue of which he holds any property as pledgee or mortgagee, or
(3) any document the production of which might tend to criminate him,

unless he has agreed in writing to produce such documents.

It would be entirely optional for the witness to produce his title-deeds, and to raise any objection whatever.

English law.—The privilege conferred by this section is more extensive than in England. For, in England, where a title-deed has been partly set out or where there is reason to suspect fraud, the production of title-deeds has been ordered.[3] In England a witness who is justified in refusing to produce title-deeds cannot be compelled to give parol evidence of their contents.

131. No one shall be compelled[1] to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Production of document which another person, having possession, could refuse to produce

COMMENT.

Persons in possession of documents on behalf of others are generally agents, attorneys, mortgagees, trustees, etc. This

[1] *Bipro Doss Dey* v. *Secretary of State for India in Council*, (1885) 11 Cal. 655.
[3] Stokes, Vol. II, p. 831.

section extends to these persons the same protection which the preceding section provides for a witness who is not a party to a suit.

1. **'Compelled.'**—The use of this word indicates that the person in possession of the document will be "allowed to produce documents which other persons would be entitled to refuse to produce if such were in their possession. This is in accordance with English law It would seem to follow that, although a barrister, pleader, attorney, or vakil is forbidden (by s. 126) to state the contents of any documents with which he has become acquainted in the course and for the purpose of his professional employment, he will be permitted to produce the document itself, if it happen to be in his possession and he choose to do so."

Witness not excused from answering on ground that answer will criminate

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue[1] in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

COMMENT.

Under this section a witness is not excused from answering any question relevant to the matter in issue on the ground that answer to such question may criminate him or expose him to a penalty or forfeiture.

1. **'Any question as to any matter relevant to the matter in issue.'**—The section does not in terms deal with all criminatory questions which may be addressed to a witness, but only with questions as to matters relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant.[2]

[1] See Field, 7th Edn., p. 468.
[2] *The Queen* v. *Gopal Doss*, (1881) 3 Mad. 271, 278, F. B.

Proviso.—This section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give.[1] The mere subpœnaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in the proviso apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question.[2] The Allahabad High Court has in recent cases held that this is too narrow an interpretation. A common sense meaning should be given to the word 'compelled'. It is impossible to deny that in the case of ordinary laymen unacquainted with the technical terms of this section, they are compelled to answer on oath questions put either by the Court or by the counsel, especially when the question is relevant to the case. An answer given by a witness under such circumstances is protected by this section. Whether or not a witness is 'compelled' within the meaning of this section to answer any particular question put to him while in the witness-box is in each case a question of fact.[3]

The Calcutta High Court has held that a witness who makes a voluntary and irrelevant statement not elicited by any question put to him while under examination is not protected by this section. It has, therefore, held that a witness making a voluntary and irrelevant statement to injure the reputation of another is guilty of defamation.[4] The Madras High Court has held that a witness is not guilty of defamation for any statements made in the witness-box.[5]

Recently the Bombay High Court has in a Full Bench case laid down that relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected by this proviso.[6] A witness who makes defamatory statements in witness-box comes within the purview of section 499, Indian Penal Code.[7]

An incriminating statement in a deposition made by a party to the suit in cross-examination in answer to questions relevant

[1] *Queen-Empress* v. *Ganu Sonba*, (1888) 12 Bom. 440, *The Queen* v. *Gopal Doss*, (1881) 3 Mad 271, F B, *Queen-Empress* v. *Moss*, (1893) 16 All 88; *Kallu* v. *Sital*, (1918) 40 All. 271.

[2] *Moher Sheikh* v. *Queen-Empress*, (1893) 21 Cal. 392.

[3] *Emperor* v. *Banarsi*, (1923) 46 All 254; *Emperor* v. *Chatur Singh*, (1920) 43 All. 92; *Emperor* v. *Ganga Sahai*, (1920) 42 All. 257.

[4] *Haidar Ali* v. *Abru Mia*, (1905) 32 Cal 756.

[5] *Manjaya* v. *Sesha Shetti*, (1888) 11 Mad. 477.

[6] *Bai Shanta* v. *Umrao Amir*, (1925) 28 Bom. L. R. 1.

[7] *Ibid.*

only as affecting his credit, and objected to, not by the deponent himself but by his pleader, is not admissible against him on his subsequent trial for giving false evidence, he being in fact 'compelled to answer.'[1]

Previous deposition.—A previous deposition is admissible against the witness on his subsequent trial unless he has brought himself under this proviso.[2]

English law.—Under the English law a witness has the privilege of refusing to answer a question upon the ground that the answer may criminate him. This section substitutes the qualified protection that the answer shall not be used against him.

CASES.

A revenue official was charged with the offence of attempting to receive a bribe from certain raiyats who gave evidence for the prosecution, and he was convicted. He subsequently charged the raiyats with having conspired to bribe him, and in their trial their depositions in the previous case were tendered in evidence for the prosecution. It was held that the depositions were admissible in evidence.[3]

Where a Magistrate, believing that the complainant had given false evidence in the course of a trial, by denying the fact of a previous conviction, had his thumb-impression taken out of Court, for the purpose of identification in a future prosecution, and there was nothing to show that the latter hadobjected to the taking ofit, it was held that the thumb-impression was admissible in a subsequent trial [illegible] the course of a trial.[4]

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Accomplice.

COMMENT.

This section should be read along with illustration (*b*) to s. 114. The Court may consider, though it is not bound to consider, an

[1] *Emperor* v. *Pramatha Nath Bose*, (1910) 37 Cal. 878.

[2] *Akhoy Kumar Mookerjee* v. *Emperor*, (1917) 45 Cal. 720.

[3] *Queen-Empress* v. *Samiappa*, (1891) 15 Mad. 63.

[4] *Tunoo Mia* v. *Emperor*, (1911) 39 Cal. 348.

accomplice unworthy of credit unless he is corroborated in material particulars. This section is the only absolute rule of law as regards the evidence of accomplices. But illustration (*b*) to s. 114 is a rule of guidance to which the Court also should have regard It is, however, not a hard-and-fast presumption, incapable of rebuttal, a *presumptio juris et de jure* [1] The evidence of an accomplice requires [illegible] because,

[illegible] [illegible] it perjury on occasion;

(*c*) he hopes for pardon or has secured it, and so favours the prosecution.[2]

Bombay view.—The Bombay High Court has held that the presumption allowed by s 114, illustration (*b*), namely, that an accomplice is unworthy of credit unless he is corroborated in material particulars, has become a rule of practice of almost universal application [3] Under ordinary circumstances it is unsafe to convict on such evidence without the corroboration of independent evidence The corroboration to the evidence of an accomplice, when required, should be such corroboration in material particulars as would induce a prudent man on the consideration of all the circumstances to believe that the evidence is true not only as the narrative of an offence committed but also so far as it affects each person thereby implicated [4] If there is no evidence in the case outside the confession of the accused, no conviction based only upon the confessions of the co-accused is good in law [5] The law does not require that every detail of the approver's story must be fortified by a similar story told by an independent witness; the effect of any such principle would be to rule out the accomplice's evidence as altogether inadmissible. It is only necessary that the accomplice's evidence should, in the circumstances of each particular case, receive that corroboration which it seems to require.[6] In dealing with the evidence of an accomplice the Judge is not bound to rely on such statements only as are corroborated by other reliable evidence. Once a foundation is established for a belief that such a witness is speaking the truth because he is corroborated by true evidence on

1 *Emperor* v *Shrinivas*, (1905) 7 Bom L R 969

2 *Barkat Ali* v. *The Crown*, (1916) P R No 2 of 1917 (Cr).

3 *Queen-Empress* v. *Maganlal*, (1889) 14 Bom. 115, 119; *Queen-Empress* v. *Chagan Dayaram*, (1890) 14 Bom. 331.

4 *Emperor* v. *Shrinivas*, (1905) 7 Bom. L. R. 969; *Reg.* v. *Budhu Nanku*, (1876) 1 Bom. 475; *Emperor* v. *Govind Balvant Laghate*, (1916) 18 Bom. L. R. 266, and *Emperor* v. *Sabitkhan*, (1919) 21 Bom. L. R. 448, take a restricted view of the necessity of independent corroboration of the testimony of an accomplice where the accomplice evidence is believed by the Court.

5 *Emperor* v. *Gangapa*, (1913) 15 Bom L. R. 975; criticised in *Emperor* v. *Sabitkhan*, (1919) 21 Bom. L. R 448.

6 *Queen-Empress* v. *Ningappa*, (1900) 2 Bom. L. R. 610

material points, the Judge is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated.[1] There may, however, be circumstances, such as where previous concert by the informers is highly improbable, in which the agreement in their stories, together with corroboration which is afforded by the circumstance that those stories cannot have been arranged between them beforehand, must be taken into account.[2] Persons coming technically within the category of accomplices cannot be treated as on precisely the same footing.[3]

It is the invariable practice of the Courts to require the corroboration by an independent witness of so much of the evidence of an accomplice as goes to identify the accused person as the offender.[4] Such corroboration ought to be that which is derived from unimpeachable or independent evidence.[5]

There is no rule of law or practice that the self-incriminating portion of the evidence of an accomplice is unworthy of belief unless corroborated. The credibility of a witness who says that he and another joined in committing an offence stands *per se* as far as his self-accusation is concerned on the same footing as that of a witness who says that he alone committed an offence though in the latter instance there would be a narrower basis for cross-examination to test his own self-accusation.[6]

Calcutta view.—The Calcutta High Court has adopted the [illegible]

in material particulars. There must be corroboration not only as to the crime, but also as to the identity of each one of the accused. This is no technical rule, but one founded on long judicial experience. A retracted confession cannot ordinarily take the place of legal proof.[7] It should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.[8]

When a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator

[1] *Emperor* v. *Bhimrao*, (1924) 27 Bom. L. R. 120.

[2] *Emperor* v. *Kuberappa*, (1912) 15 Bom. L. R. 288.

[3] *King Emperor* v *Malhar*, (1901) 3 Bom. L. R. 604.

[4] *Emperor* v. *Kostalkhan*, (1902) 4 Bom. L. R. 431; *Queen-Empress* v. *Krishnabhat*, (1885) 10 Bom. 319.

[5] *Emperor* v. *Baji Krishna*, (1924) 6 Bom. L. R. 481.

[6] *Emperor* v. *Hanmant*, (1904) 6 Bom. L. R. 443.

[7] *Emperor* v. *Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559.

[8] *Yasin* v. *King-Emperor*, (1901) 28 Cal. 689.

with the principal offender. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at the surrounding circumstances, in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by these circumstances or whether the

to by that accomplice.[1] Where the complainant did not willingly offer to bribe, but the accused, a police officer, demanded it before taking up the charge lodged by the complainant and made use of his official position to enforce his demand, it was held that the circumstances were such as would justify a conviction on the testimony of accomplices with a much slighter degree of corroboration than would be the case if the accomplices were entirely voluntary accomplices[2] Where witnesses appeared to have taken an active part in carrying away a person after he had was in a helpless condition, and ther he was subsequently found dead, it was no better than that of the accomplices ; at any rate, it would be most unsafe for the Court to rely upon their evidence, unless corroborated in material respects, in convicting the accused.[3]

Madras view.—The opinion in Madras is not unanimous on the point. Two
v. *Nilkanta*[4]
Muthukumar
the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true. The majority

Allahabad view.—The Allahabad High Court has held that although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice at the time of giving his evidence

1 *Kamala Prasad* v *Sital Prasad*, (1901) 28 Cal. 339; *Banu Singh* v. *Emperor*, (1905) 33 Cal. 1353.
2 *Deo Nandan Pershad* v. *Emperor*, (1906) 33 Cal 649.
3 *Alimuddin* v. *Queen-Empress*, (1895) 23 Cal. 361.
4 (1911) 35 Mad. 247; *Govinda* v. *King-Emperor*, (1920) 17 N. L. R. 113
5 (1912) 35 Mad. 397.
6 *Alimuddin* v. *Queen-Empress*, (1895) 23 Cal. 361.

may stand, and the motives which he may have for stating what is

some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him [2]

Burma view.—The Rangoon High Court has laid down that there is no positive legal bar to taking an approver's evidence as a basis for a conviction, but unless some reliable corroboration on a material point were super-added to it, it would, in almost all cases, be unsafe to accept it as conclusive [3]

The following rulings indicate the views of the former Chief Court of Lower Burma and Judicial Commissioner's Court of Upper Burma prior to the establishment of the Rangoon High Court.

While the terms of this section suggest that a conviction based upon evidence of the kind referred to is to be regarded as exceptional, and the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, the Court must carefully test the truth of the uncorroborated evidence of an accomplice and must search for the motives which have prompted the accomplice to say what he has said and for the circumstances which led up to his disclosures. The evidence must be subjected to the most rigid tests in the endeavour to ascertain the true facts. If after doing this the Court is satisfied that the accomplice has [illegible].[4] In [illegible], the [illegible]lence of an accomplice should be clearly and fully set out. It is not sufficient to set out formally that the witness is an accomplice, but that he is believed, although uncorroborated.[5]

The Judicial Commissioner's Court of Upper Burma had held that, although under ordinary circumstances corroboration of an [illegible]

[1] *Queen-Empress* v. *Gobardhan*, (1887) 9 All. 528

[2] *Queen-Empress* v. *Ram Saran*, (1885) 8 All. 306.

[3] *Maung Lay* v. *King-Emperor*, (1923) 1 Rang. 609.

[4] [illegible] *Empress*, (1878) S. J. L. B. 54; *Nga Shwe Lox* v. *Queen-Empress*, (1885) S. J. L. B. 322.

[5] *Nga Po Thet* v. *The Queen-Empress*, (1900) 1 L. B. R. 29.

[6] *Queen-Empress* v. *Nga Tun Baw*, (1898) 1 U. B. R. (1897-1901) 173; *King-Emperor* v. *Nga Po Tha*, (1913) 1 U. B. R. 170

accompli
ately.[1]
testimon ... it
might be taken into consideration as lending support to other evidence in the case. But if there was no other evidence, it was not a proper basis for a conviction. It was not strengthened by the fact that it was supported by other confessions, whether those had been made in such circumstances as to preclude the theory that there had been connivance between the persons making the confessions or not.[2]

The Punjab view.—The former Chief Court of the Punjab had

what extent an accomplice must be corroborated.[3]

Accomplice.—See s. 114, ill. (*b*), as to the meaning of the word

the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy, whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.[4]

134. No particular number of witnesses shall in any case be required for the proof of any fact.

Number of witnesses

COMMENT.

Under the Act no particular number of witnesses is required in any case. Under the English law, however, in certain cases two witnesses
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that ir
Indian law do not apply, the rule of English law which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in this country.[5]

[1] *Nga Po Yin* v. *King-Emperor*, (1906) U. B. R (1904-1906) (Evi) 3.
[2] *Nga San Nyein* v. *King-Emperor*, (1917) 3 U. B. R. 3.
[3] *Balmokand* v. *Crown*, (1915) P. R. No. 17 of 1915 (Cr.).
[4] *Emperor* v. *Chaturbhuj Sahu*, (1910) 38 Cal. 96; *Queen-Empress* v. *Bastin*, (1897) P. J. L. B. 365; *Queen-Empress* v. *Nga See*, (1898) 1 U. B. R. (1897-1901) 176.
[5] Per Jenkins, C. J., in *Emperor* v. *Bal Gangadhar Tilak*, (1904) 6 Bom. L. R. 324, 339.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.[1]

COMMENT.

This section deals with the *order* in which witnesses are to be examined ; and not with the *quantity* or *quality* of the proof.

In civil proceedings the c
of the Civil Procedure Code
of the Criminal Procedure C
determined by the discretion of the Court. In practice, however, it is left largely to the option of the party calling witnesses to examine them in any order he chooses.

Civil proceedings. ... ho gene-
... [I, r. 1).
... If the
defendant admits the facts alleged by the plaintiff and relies on a defence, it is for him to establish that defence. The plaintiff may then prove his case in rebuttal if any (O. XVIII, r. 3). Where a party ... :
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which goes to cut down the defence, without being confirmation of the original case.[2]

In *civil appeals*, the appellant is heard first in support of his appeal. If the Court does not dismiss the appeal at once, the respondent is heard against the appeal; and in such case the appellant is entitled to reply (O. XLI, r. 16).

Criminal proceedings.—In *criminal proceedings*, the complainant or the prosecutor as the case may be, has the right to begin : and, if necessary, the accused is asked to adduce his evidence in
... ins cases
... (ss. 252,
... inquire
... (s. 208).
... ourt, the

[1] *Bigsby* v. *Dickinson*, (1876) 4 Ch. D. 24.

[2] *Rex* v. *Hilditch*, (1832) 5 C. & P. 299.

procedure is laid down by ss. 271, 286, 289, 290, 291 and 292. In hearing *appeals*, the appellant begins and if necessary the other side is heard next (s. 423).

Commission.—In both civil and criminal proceedings witnesses may be examined on commission, where evidently the same rules will apply respectively (see Civil Procedure Code, O. XXVI, rr. 1-8; Criminal Procedure Code, ss. 503-507). Evidence taken on commission is later put on the record of the case [1]

1. 'Discretion of the Court.'—The Court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined.[2] While counsel has discretion, the Court has also the power to direct the order in which witnesses cited by the party shall be examined.[3]

Judge to decide as to admissibility of evidence

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost

1 *Kusum Kumari Roy* v *Satya Ranjan Das*, (1903) 30 Cal 999; *Man Gobinda Chowdhuri* v. *Shashindra Chandra Chowdhuri*, (1907) 35 Cal. 28; *Dhanu Ram Mahto* v. *Murti Mahto*, (1909) 36 Cal 566.

2 Per Stanley, J., in *Kedar Nath Ghose* v *Bhupendra Nath Bose*, (1900) 5 C W N. xv

3 *In the goods of Gopessur Dutt*, (1911) 16 C. W. N. 265.

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COMMENT.

This section deals with the *order* in which witnesses are to be examined, and not with the *quantity* or *quality* of the proof.

In civil proceedings the *order* is to be regulated by the provisions of the Civil Procedure Code; and in criminal proceedings, by those of the Criminal Procedure Code. Failing these, the order is to be determined by the discretion of the Court. In practice, however, it is left largely to the option of the party calling witnesses to examine them in any order he chooses.

Civil proceedings.—In *civil* suits, it is the plaintiff who generally has the right to begin (Civil Procedure Code, O. XVIII, r. 1). The other party has then to state his case (O. XXVIII, r. 2). If the defendant admits the facts alleged by the plaintiff and relies on a defence, it is for him to establish that defence. The plaintiff may then prove his case in rebuttal if any (O. XVIII, r. 3). Where a party [illegible] ing, th [illegible] him tc [illegible] which goes to cut down the defence, without being confirmation of the original case.[2]

In *civil appeals*, the appellant is heard first in support of his appeal. If the Court does not dismiss the appeal at once, the respondent is heard against the appeal; and in such case the appellant is entitled to reply (O. XLI, r. 16).

Criminal proceedings.—In *criminal proceedings*, the com- [illegible] 254, 257), or (c) summary (s. 262). A Magistrate may also inquire into cases triable by the Court of Session or High Court (s. 208). Where a trial is had before a Court of Session, or High Court, the

[1] *Digsby* v. *Dickinson*, (1876) 4 Ch. D. 24.

[2] *Rex* v. *Hilditch*, (1832) 5 C. & P. 299.

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(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost

1 *Kusum Kumari Roy* v. *Satya Ranjan Das*, (1903) 30 Cal 999; *Man Gobinda Choudhuri* v *Shashindra Chandra Chowdhuri*, (1907) 35 Cal. 28, *Dhonu Ram Mahto* v. *Murli Mahto*, (1909) 36 Cal. 566.

2 Per Stanley, J, in *Kedar Nath Ghose* v. *Bhupendra Nath Bose*, (1900) 5 C. W N xv.

3 *In the goods of Gopessur Dutt*, (1911) 16 C. W. N. 265.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(*c*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified.

(*d*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A.

COMMENT.

This section embodies three cardinal rules as to the admissibility of evidence.

In order to focus the attention of the litigants to the points in dispute between them, issues are raised on the pleadings. The parties are called upon to lead evidence on them. Such evidence must primarily relate to facts in issue; but it may also refer to relevant facts (s. 5). In the latter case, the first paragraph of this section enables the presiding Judge to ask the party to show the relevancy of the fact which is sought to be proved.

In dealing with the relevancy of facts as above, two sets of special circumstances may arise: first, where the *evidence of one fact is admissible* only upon proof of some other fact, such last-mentioned fact must be proved first, unless the Court accepts the undertaking by the party that it will be proved later on (cl. 2); and, secondly, where the *relevancy of one fact depends* upon the proof of another fact, the Judge may in his discretion permit either of them to be proved first (cl. 3).

Clause 2.—This clause should be read with s. 104 (*q.v.*). Its purpose is to facilitate a party in laying his case before the Court. Where a witness in the box deposes to a story, some portions of which would become admissible only on proof of certain other facts, it is convenient as well as economical in time to permit him to com- [illegible] ves an assurance [illegible] on. Illustrations

[illegible] r terms. When the relevancy of one fact depends upon the proof of another fact, [illegible]

as they arise and should not be reserved till judgment in the case

is given.[1] Where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non-admissibility.[2]

Examination-in-chief

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Order of examinations

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter

COMMENT.

The examination of witnesses is *viva voce* (O. XVIII, r. 4). It is always in the form of questions and answers. The deposition is usually taken down in the form of a narrative formed out of the answers (O. XVIII, r. 5). Where a question is objected to and yet allowed by the Court to be put, the question and its [illegible] (O. XVIII, r 10). At the end of [illegible] to the witness and signed by the [illegible] 5).

The *viva voce* examination consists generally of three stages: First of all, the witness is examined by the party who calls him;

[1] *Jadu Rai* v. *Bhubotaran Nundy*, (1889) 17 Cal. 173; *Ramjibun Serowgy* v. *Oghore Nath Chatterjee*, (1897) 25 Cal. 401.

[2] Per Straight, J., in *The Collector of Gorakhpur* v. *Palakdhari Singh*, (1889) 12 All. 1, 26, F. B.

it is called the examination-in-chief (s. 137). He is next examined by the adverse party; it is called the cross-examination (s. 137) Finally he is examined again by the party who called him; it is called the re-examination (s. 137).

Examination-in-chief.—This will ordinarily be in the form

questions put to the witness

te to relevant facts [s. 138

(s. 142).

dmissible, witnesses must, in general, merely speak to facts within their own knowledge; and they will not be permitted . . . to express their own belief or opinion. But though a witness, in general, must depose to such facts only as are within his own knowledge, the law does not require him to speak with such expression of certainty as to exclude all doubt. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may state what he remembers concerning it, and leave the jury to judge of the weight of his testimony. But if the impression on his mind be so slight as to justify the belief that it may have

may often be unattainable. In such cases, a witness is allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question from other facts, provided these last facts are within his personal knowledge.[2]

"On the other hand, ... the opinions of skilled witnesses cannot, be received, when the inquiry relates to a subject, which does not require any peculiar habits or course of study in order to qualify a man to understand it. Thus, evidence is inadmissible to prove that one name, or one trade-mark, so nearly resembles another as to be calculated to deceive, or that the make up of one tin of coffee is so like another as to be calculated to deceive purchasers. So, also, witnesses are not permitted to state their views on matters of moral or legal obligation, or in the manner in which other persons would probably have been influenced, had the parties acted in one way rather than another.... To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a driver is *careful*; a road *dangerous*; or an assault or homicide *justifiable*. Nor may he be asked whether a clause in a

[1] Taylor, 11th Edn., ss. 1414-15, pp. 966-967.

[2] *Ibid*, s. 1416, p. 967.

[3] *Ibid*, s. 1417, p. 968.

contract restricting trade is reasonable or unreasonable, for this is a question for the judge."[1]

"The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case as proved by other witnesses* at the trial. But here a witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine."[2]

It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged, the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible [3]

The statements made in examination-in-chief, however, lose much of their credibility and weight, unless they are put into the crucible of cross-examination and emerge unscathed from the test.

Cross-examination.—"The exercise of this right is justly regarded as one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation or the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury, for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended."[4]

The objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party.[5]

When the examination-in-chief has resulted in clear, conclusive, or unimpeachable evidence, it may be prudent for the adverse party not to cross-examine; for, in such a case, he may by so doing,

[1] Taylor, 11th Edn., s. 1419, p. 970
[2] *Ibid*, s. 1421, p. 972.
[3] Powell, 526.
[4] Taylor, 11th Edn., s. 1428, p. 978.
[5] Powell, 532.

instead of weakening the evidence, merely strengthen and confirm it. So, too, he will generally not cross-examine a witness, whose evidence he admits, or which cannot possibly injure his case. Reckless cross-examination, moreover, often lets in evidence which before was not admissible.[1]

The trend of the cross-examination is in most cases determined by the line of narrative unfolded in the examination-in-chief. It is usual to take each important item so deposed to and to cross-examine the witness upon it. Its purpose is twofold. First of all, the cross-examiner tries to discover if the story told by the witness-in-chief is tainted by exaggerations or falsehoods. Secondly, the adverse party can in some cases construct his line of defence from out of the mouth of the witness.

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his cause, or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood.[2]

In England and in Ireland the "cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case; and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. So far has this doctrine been carried that, even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary for the sake of formal proof only, is thereby made a witness for all purposes, and may be cross-examined as to the whole case.[3]

A cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth.[4]

A skilful cross-examination is the highest attainment of an advocate's art. It is difficult to frame any rules governing it: as its technique can be acquired only by natural instincts or by long practice. [illegible]

Like [illegible]
relevant f[illegible]
to facts deposed to in the preceding examination (s. 138). Further, it differs from both of them, inasmuch as leading questions can be asked (ss. 142, 143).

[1] Powell, 531.

[2] Per Norman and Seton Karr, JJ., in *Meer Sujad Ali Khan Nawab Zoolfukar Dowla Bahadoer v. Lalla Kasheenath Doss*, (1866) 6 W. R. 181, 182.

[3] Taylor, 11th Edn., s. 1432, p. 983.

[4] Per Lord Herschell, L. C., in *Browne v. Dunn*, (1894) 6 R. 67—H. L.

No cross-examination can be allowed of a witness who is "summoned to produce a document" (s. 139), but it is competent of a witness to character (s. 140) Similarly, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved (s. 145).

The range of cross-examination is unlimited, the only circumscribing limits being that it must 'relate to relevant facts' (s. 138).

By ss 146 to 150 the Legislature has tried to give very wide powers to the cross-examiner to help him in finding out the truth in oral depositions laid out before the Court. But the Legislature protects the witness (*a*) from consequences which he might incur from speaking the truth; and (*b*) from needless questions, for the cross-examiner has to see that the imputations he makes against the witness are well-founded.

In the course of cross-examination, a witness may be asked questions:—

(1) to test his veracity;
(2) to discover who he is and what is his position in life,
(3) to shake his credit by injuring his character, although his answer might criminate him or expose him to penalty or forfeiture (s. 146).

The cross-examiner is treading on safe ground so far as (1) and (2) are concerned As regards (3), complex set of considerations present themselves. If the questions refer to a *relevant matter* the provisions of s 132 are applicable (s. 147). If, however, the questions refer to an *irrelevant matter*, they are proper—

(1) if the truth or imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness.

They are improper—

(1) if the imputation conveyed by them relates to matters so remote in time or of such a character that they would not affect the credibility of the witness;
(2) if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence (s. 148).

Before such questions are asked, the person putting them must have reasonable ground for thinking that the imputation was well-founded (s. 149) If any lawyer asked such question without reasonable grounds, the Court may report the case to the High Court or other authority to which he is subject (s. 148).

All questions or inquiries which are indecent or scandalous, unless they relate to facts in issue, are to be avoided (s. 151); so also all questions which are calculated to insult or annoy or couched in needlessly offensive form (s 152).

Cross-examination is in almost all cases undertaken by the adverse party; but the Court may permit a party to cross-examine his own witness if he proves to be a hostile witness (s. 154).

In criminal cases (warrant cases) tried by Magistrates, the accused person can, after the charge has been framed and he has given his plea, re-call and cross-examine any witness for the prosecution (Criminal Procedure Code, s. 256).

An accused person may cross-examine a witness called by a co-accused for his defence when the case of the second accused is adverse to that of the first.[1]

If there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination-in-chief has begun, the adverse party ought not to have the right to take advantage of this mistake by cross-examining the witness.[2]

Where the prosecution declines to call in the Court of Session a witness for the Crown who has been examined in the Magistrate's Court, and such witness is thereupon placed in the witness-box by counsel for the defence, counsel for the defence is not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition are, under the circumstances, only admissible by way of cross-examination, with the permission of the Court, if the witness proves himself a hostile witness.[3]

Re-examination.—The counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, not suited to the purpose of explaining either the expressions or the motives of the witness.[4]

The object of re-examination is to afford the party calling a witness an opportunity of filling in the lacuna or explaining the inconsistencies which the cross-examination has discovered in the examination-in-chief of the witness. It is accordingly limited to the explanation of matters referred to in cross-examination (s. 138). It partakes of the nature of examination-in-chief inasmuch as no leading questions can be asked (s. 142). If the cross-examination is ineffective, no re-examination is, as a rule, made.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence on the

[1] *Ram Chand Chatterjee* v. *Hanif Sheikh*, (1893) 21 Cal. 401.

[2] Per Coleridge, J., in *Wood* v. *Mackinson*, (1840) 2 M. & Rob. 273, 275.

[3] *Queen-Empress* v. *Zawar Husen*, (1897) 20 All. 155.

[4] Per Lord Tenterden in *Queen Caroline's case*, quoted in *Prince* v. *Samo*, (1838) 7 A. & E. 627.

examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination.[1]

After a witness has been cross-examined, the party who called him has a *right to re-examine him*, and to ask all questions which may be proper to draw forth [illegible] sions used by the witnes [illegible] selves doubtful, and a [illegible] induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[2] If the counsel chooses to cross-examine the witness as to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given.[3] "If a question has been omitted in the examination-in-chief, and cannot, in strictness, be asked on re-examination, as not arising out of the cross-examination, it is usual for the counsel to request the Judge to make inquiry, and such a request is generally granted."[4]

Examination by Court.—It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138.[5]

CASE.

[illegible]

dure was irregular, and opposed to the provisions of this section.[6]

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

Cross-examination of person called to produce a document

COMMENT.

A witness summoned merely to produce a document become a witness for purposes of cross-examination; since

[1] Powell, 539.
[2] Taylor, 11th Edn., s. 1474, p. 1011.
[3] *Ibid*, s. 1475, p. 1012.
[4] *Ibid*, s. 1477, p. 1013.
[5] Per Garth, C. J., in *Kazi* v. *The Empress*, 279, 283.
[6] *Nur Bux Kazi* v. *The* (1880) 6 Cal. 279.

examination-in-chief and that which has been given in cross-examina-
tion ; or for the purpose of r
that the cross-examination m
or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination.[1]

After a witness has been cross-examined, the party who called him has a *right to re-examine him*, and to ask all questions which may be proper to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive, or provocation, which induced the witness to use those expressions ; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.[2] If the counsel chooses to cross-examine the witness as to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given.[3] "If a question has been omitted in the examination-in-chief, and cannot, in strictness, be asked on re-examination, as not arising out of the cross-examination, it is usual for the counsel to request the Judge to make inquiry, and such a request is generally granted."[4]

Examination by Court.—It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions ; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138.[5]

CASE.

At the trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed. It was held that such a course of procedure was irregular, and opposed to the provisions of this section.[6]

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Cross-examination is in almost all cases undertaken by the adverse party; but the Court may permit a party to cross-examine his own witness if he proves to be a hostile witness (s. 154).

In criminal cases (warrant cases) tried by Magistrates, the accused person can, after the charge has been framed and he has given his plea, re-call and cross-examine any witness for the prosecution (Criminal Procedure Code, s. 256).

An accused person may cross-examine a witness called by a co-accused for his defence when the case of the second accused is adverse to that of the first.[1]

If there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination-in-chief has begun, the adverse party ought not to have the right to take advantage of this mistake by cross-examining the witness.[2]

Where the prosecution declines to call in the Court of Session a witness for the Crown who has been examined in the Magistrate's Court, *and such witness is thereupon placed in the witness-box* by counsel for the defence, counsel for the defence is not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition are, under the circumstances, only admissible by way of cross-examination, with the permission of the Court, if the witness proves himself a hostile witness.[3]

Re-examination.—The counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, not suited to the purpose of explaining either the expressions or the motives of the witness.[4]

The object of re-examination is to afford the party calling a witness an opportunity of filling in the lacuna or explaining the inconsistencies which the cross-examination has discovered in the examination-in-chief of the witness. It is accordingly limited to the explanation of matters referred to in cross-examination (s. 138). It partakes of the nature of examination-in-chief inasmuch as no leading questions can be asked (s. 142). If the cross-examination is ineffective, no re-examination is, as a rule, made.

When the cross-examination of the witness is concluded, the party who called him has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence on the

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2 Per Coleridge, J., in *Wood* v. *Mackinson*, (1840) 2 M. & Rob. 273, 275.

3 *Queen-Empress* v. *Zawar Husein*, (1897) 20 All. 155.

4 Per Lord Tenterden in *Queen Caroline's case*, quoted in *Prince* v. *Samo*, (1838) 7 A. & E. 627.

examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination.[1]

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examination this presumption does not exist and leading questions are therefore allowed. Leading questions can only be asked in examination-in-chief when they refer to matters which are (1) introductory, (2) undisputed, or (3) sufficiently proved. The reason for excluding leading questions from examination-in-chief is quite obvious: it would enable a party to prepare his story and evolve it in his very words from the mouth of his witnesses in Court. It would tend to diminish chances of detection of a concocted story. If a witness is allowed to give his narrative in his own words, he is likely, if the story is made up, to leave some loopholes, to which the cross-examiner will scarcely fail to direct his attack.

It is the Court, and not counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for that permission rests on the Court.[1]

The Court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation; and indeed, the Judge has a discretionary power,—not controllable by the Court of Appeal,—of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require.[2]

As soon as the witness has been duly sworn, it is the province of the party by whom he is produced to examine him. This is called his direct examination, or his examination in chief; and in this examination, *leading questions*,—that is, questions which suggest to the witness the answer desired, or which, embodying a [illegible]

would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established.[3]

Leading questions can be freely indulged in in cross-examination: "First, and princ[illegible] has a bias in favour of [illegible] to his opponent. Seco[illegible] an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such

[1] Per Jenkins, C. J., in *Barindra Kumar Ghose v. Emperor*, (1909) 37 Cal. 467, 509.

[2] Taylor, 11th Edn., s. 1405, pp. 959, 960.

[3] Taylor, 11th Edn., s. 1404, 958.

a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole."[1]

With respect to the m [illegible]
it is admitted on all hands, [illegible]
asked ; but this does not m [illegible]
of putting the very words i [illegible]
is to echo back again ; neither does it sanction the putting of a question, assuming that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact. The rule ought also [illegible]
where the witness is evidently [illegible]
for although it appears in one [illegible]
leading questions may always be put in cross-examination, whether a witness be unwilling or not, some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who *originally called the witness, has brought the evil on his own head ;* for a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him ; or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust.[2]

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not *contained in a document, and if he says that it was, or* if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence *being given until* such *document* is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

[1] Best, 12th Edn., s. 641, p. 561. [2] Taylor, 11th Edn., s. 1431, p 982.

Illustration.

The question is, whether A assaulted B.

C deposes that he heard A say to D—"B wrote a letter accusing me of theft, and I will be revenged on him." This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

COMMENT.

This section is meant to enable the parties to carry out the provisions of ss. 91 and 92. A party can compel the opposite party to produce a document (or to make out a case for letting in its secondary evidence)—

(1) when a witness is about to give evidence as to any (*a*) contract, (*b*) grant, or (*c*) other disposition of property, which is contained in a document; or

(2) when he is about to make any statement as to the contents of any document.

This rule does not forbid a witness from giving oral evidence of statements as to relevant facts, made by other persons, about the contents of documents.

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

COMMENT.

In a way this section is an exception to the general rule forbidding all use of the contents of a written document until the document itself be produced.

One of the modes in which, according to the Evidence Act, the credit of a witness may be impeached is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; and this section gives the right to cross-examine a witness on previous statements made by him and reduced into writing when those previous statements are relevant to the matter in issue.[1]

A witness may be cross-examined as to any statements as to relevant facts made by him on a former occasion, *in writing* or *reduced into writing*, without showing the writing to him or proving

[1] Per Aikman, J., in *Queen-Empress* v *Mannu*, (1897) 19 All. 390, 421-422, F. B.

[illegible] But if it is intended to contradict him by the writing, his [illegible] object of this provision [illegible] or to contradict him by [illegible] ng may be documents, [illegible] must be noted that the previous record is in writing. The witness may also be contradicted by his previous verbal statements (s. 153, Exception 2).[1]

A witness may be questioned as to his previous written statements for two purposes: it may be to test his memory; and the very object would be defeated if the writing were placed in his hand before the questions were asked; or it may be to contradict him, and here it would be obviously unfair not to give him every opportunity of seeing how the matter really stands.[2] If you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.[3]

Documents.—A witness can be confronted with the statements made in writing in his account-books: but a clerk who writes the accounts at the mere dictation of his employer cannot be so confronted. In a case, A was employed by B, at intervals of a week or fortnight, to write up B's account-books, B furnishing him with the necessary information either orally or from loose memoranda. It was held that the entries so made could not be given in evidence to contradict A under this section, as previous statements made by him in writing. The statements were really made, not by A but by B, under whose instructions A had written them.[4]

Deposition.—In a trial before a Court of Session, counsel for the prisoner is not entitled to refer to the depositions given before the committing Magistrate for the purpose of contradicting the witness before the Sessions Court, without drawing their attention to the alleged contradictions in their previous depositions and giving them an opportunity of explaining the same.[5]

Statements of witnesses recorded by a police officer while making an investigation under s. 161, Criminal Procedure Code, form no part of police diaries and an accused person on his trial has [illegible] call for and inspect such statements and cross-examine

[illegible] Kapurchand, [illegible] 23 [illegible] H. L. C., in [illegible] 6 R. 67—H. L. [illegible] konji v. The [illegible] W. Company, [illegible] war Rahman,

(1902) 31 Cal. 142, F. B.; *Queen-Empress* v. *Dan Sahai*, (1885) 7 All. 862; *Reg* v. *Arjun Megha*, (1874) 11 B. H. C. 281; *Emperor* v. *Lakshman Totaram*, (1915) 17 Bom. L. R. 590; *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit*, (1915) 17 Bom. L. R. 527, 39 Bom. 441, P. C.

the witness thereon.[1] Section 162 of the Criminal Procedure Code provides that the accused may be furnished with a copy of the statement of a witness, "in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act 1872." The words "if duly proved" clearly show that the record of the statement cannot be admitted in evidence straightway but that the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness. The provisions of s. 67 of the Evidence Act apply to this case, as well as to any other similar case. Under s. 162 as amended it is not now permissible for statements to the Police, whether oral or written, to be put in evidence, in order to corroborate a prosecution witness, or to contradict a defence witness. A statement to the Police can only be used for one purpose, and that is, by the accused to contradict a prosecution witness in the manner provided by this section.[2]

Police diaries.—It is the absolute duty of Judges and Magistrates to entirely disregard all statements and entries in special diar[illegible] purpose, except for [illegible] lice officer who mac[illegible] contradiction; and even in that case they are not evidence of anything except that such police officer made the particular entry which is at variance with his subsequently given evidence; they are not evidence that what is stated in the entry was true or correctly represents what was said or done.[3]

Where the police officer who made the special diary is allowed to refresh his memory and does look at an entry in the diary for the purpose of refreshing his memory, the provisions of section 161 of the Indian Evidence Act, 1872, apply, and the accused or his agent is entitled to see such entry in the special diary and to cross-examine such police officer thereupon. There is no provision in section 172 of the Code of Crimina[illegible] police officer who mac[illegible] looking at the special [illegible] a special diary cannot be used to enable any witness other than the police officer who made the special diary to refresh his memory by looking at it. This is in truth a general principle of law. The criminal Court, but not an accused person or his agent, unless the police officer has been allowed to look at the diary in order to refresh his memory, can use the special diary for the purpose of contra-

1 *Bikao Khan* v. *The Queen-Empress*, (1889) 16 Cal. 610; *Sheru Sha* v. *The Queen-Empress*, (1893) 20 Cal. 642.

2 *Emperor* v. *Vithu Balu*, (1924) 26 Bom. L. R. 965.

3 Per Edge, C. J., in *Queen-Empress* v. *Mannu*, (1897) 19 All 390, 412, F. B.; *Dadan Gazi* v. *Emperor*, (1906) 33 Cal. 1023, 1026, 1027.

dicting the po[illegible] but before doing so the Court must comply [illegible]
Evidence Act [illegible]
such parts of the special diary as are to be used for the purpose of [illegible] y would [illegible] of Crimi- [illegible] accused [illegible] witness other than the police officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness *other than the police officer who made it.* Section 145 of the Indian Evidence Act, 1872, does not either extend or control the provisions of section 172 of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the police officer who made it that section 145 of the Indian Evidence Act, 1872, applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a party to contradict any other witness in the case, or to show it or any part of its contents to any other witness. No reading of section 172 of the Code of Criminal Procedure consistent with the rules [illegible] the English language is possible [illegible] e used to contradict any person [illegible] it. It is not enacted in section 172 of the Code of Criminal Procedure by reference to section 145 of the Indian Evidence Act, 1872, or otherwise that if the special diary is used by the Court to contradict the police officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case.[1] The Privy Council has approved of this ruling in a criminal appeal from the judgment of the Court of the Judicial Commissioner of the Central Provinces. The Judicial Commissioner admitted in a murder trial statements made by witnesses to the police and entered in the police diary. The Judicial Committee observed that the Judicial Commissioner went wrong in doing so and held that a diary made by the police officer under s. 172 of the Code of Criminal Procedure might be used under that section to assist the Court which tried the case by suggesting means of further elucidating points which need clearing up, and which were material for the purpose of doing justice between the Crown and the accused, but not as containing entries which could by themselves be taken to be evidence of any date, fact, or statement contained in the diary, and that the police officer who made the diary might be confronted with it, but not any other witness.[2]

CASE.

In the course of a trial before the Sessions Court the entire evidence of the complainant given before the committing Magis-

[1] Per Edge, C. J., in *Queen-Empress* v. *Mannu*, (1897) 19 All. 390, 393, 394, F.B.

[2] *Dal Singh* v. *Emperor*, (1917) 19 Bom. L. R. 510, P.C.

trate was admitted as a whole during the cross-examination of that witness. It was held that the procedure followed was objectionable, inasmuch as the deposition so introduced was used for the purpose of contradicting the witness. Beaman, J., observed: "If the previous deposition was intended to contradict the witness at the trial, it was contrary to principle to admit the evidence in the manner adopted without first drawing the attention of the witness to every point upon which it was to be used to contradict him. If the statement was intended to corroborate the witness as a whole, it could not have been put in in cross-examination."[1]

Questions lawful in cross examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to,[1] be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

COMMENT.

This section gives very wide powers to the cross-examiner . 138 ; and is more extensive in scope. confines his questions to the points tness or discovering his status in life, his power of putting questions. But when he undertakes the difficult yet delicate task of impeaching the character of a witness, the following sections (ss. 147 to 150) give ample protection to a witness in speaking the truth and impose wholesome restraints upon groundless assertions levelled against him. "If any such question relates to a matter relevant to the suit or proceeding......the provisions of s. 132 are by s 147 declared applicable to it. If the question is as to a matter relevant only in so far as affects the credit of a witness by injuring his character, the Court is by s 148 directed to decide whether or not the witness is to be compelled to answer, and may.. .warn the witness that he is not obliged to answer it.....When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character."[2]

[1] *Emperor* v. *Lakshman Totaram*, (1915) 17 Bom. L. R 590

[2] Per Turner, C. J, in *The Queen* v. *Gopal Doss*, (1881) 3 Mad 271, 278, F B

This section extends the power of cross-examination far beyond the limits of s. 138, paragraph 2, which confines the cross-examination to relevant facts, including of course the facts in issue. The language of this section, coupled with that of ss. 138 and 147, looks as if the word "additional" facts spoken of in this section were considered as not relevant. But of course this could not be the case. It would be an absurd waste of time to enquire into facts which were irrelevant. As is indicated in s. 148 these facts are relevant as tending to show how far the witness is trustworthy: and the only object of classing these facts apart from other relevant facts is in order that special rules may be laid down as to where they may be contradicted and when a witness may be compelled to answer them.[1]

Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the judge's belief or disbelief in the witness's story.[2]

1. **'Hereinbefore referred to,'** that is, referred to in s. 138, paragraph 2.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

When witness to be compelled to answer.

COMMENT.

This section only applies to questions referred to in cl. 3 of the preceding section. It refers to "matters relevant to the suit or proceeding." *The following section (i.e., s. 148) refers to* "matters not relevant to the suit or proceeding."

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

Court to decide when question shall be asked and when witness compelled to answer.

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed

1 Markby, p. 107.

2 *The Bombay Cotton Manufacturing Co., Limited* v. *Raja Bahadur Shivlal Motilal*, (1915) 17 Bom. L. R. 455, 39 Bom. 386, P. C.

by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

COMMENT.

When any such question, that is, the question referred to in s. 146, is *not relevant* to the suit or proceeding, the Court must decide whether or not the witness shall be compelled to answer it and may warn the witness that he is not obliged to answer it

Such questions are *proper*—

(1) if they are of such a nature that the truth of the imputation made touches the credibility of the witness.

They are *improper*—

(1) if the imputation refers to (*a*) matters so remote in time, or (*b*) of such a character, that its truth does not affect the credibility of the witness ; or

(2) if there is a great disproportion between the importance of the imputation and the importance of the evidence.

If the witness refuses to answer any question it is open to the Court to draw the inference that the answer if given would be unfavourable [cf. s 114, ill. (*b*)]

The object of this section is to prevent the unnecessary raking up of the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. In the course of cross-examination, the temptation is always too great to run down a witness's character ; the Legislature has, therefore, wisely provided ample safe-guards for the unfortunate witness and placed wholesome checks on the wily cross-examiner. It would seem that under this section a witness cannot be compelled to answer irrelevant questions ; but if he chooses to answer them, he cannot be contradicted by other evidence (s. 153).

"It has been much debated, whether a witness is bound to answer any question, the direct and immediate effect of answer-

ing which might be *to degrade his character*. On this subject the law still remains in a somewhat unsettled state, but thus much would seem to be clear; viz., that were the transaction, to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct. Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony might be necessary for the protection of the property, the reputation, the liberty, or the life of a fellow-subject, or might at least be required for the due administration of public justice. Were such a rule of protection to prevail, a man who had been convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape."[1]

"In connection with this subject, we may refer to some provisions which we have inserted in order to prevent the abuse of the power of cross-examination to credit. We believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuses. The need for the power and danger of its abuse are proved by English experience, but in this country litigation of various kinds, and criminal prosecutions in particular, are the great engines of malignity, and it is accordingly even more necessary here than in England, both to permit the exposure of corrupt motives and to prevent the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows:

"Such questions may relate either to matters relevant to the case, or to matters not relevant to the case. If they relate to matters relevant to the case, we think that the witness ought to be compellable to answer, but that his answer should not afterwards be used against him.

"If they relate to matters not relevant to the case except in so far as they affect the credit of the witness, we think that the witness ought not to be compelled to answer. His refusal to do so would, in most cases, serve the purpose of discrediting him, as well as an express admission that the imputation conveyed by the question was true."[2]

CASES.

Clauses 1, 2.—On an indictment for rape, or for attempt at rape or for indecent assault, the prosecutrix cannot be asked in cross-examination whether she had had connection with another person not the prisoner; and if she denies it evidence cannot be

[1] Taylor, 11th Edn., s. 1459, p. 1004.

[2] Proceedings of the Legislative Council.

called to contradict her.[1] But she can be asked whether she had on previous occasions connection with the prisoner,[2] or whether she was a common prostitute.[3]

Clause 2.—The accused offered himself as a surety for a person who had been ordered to find security for good behaviour. The Magistrate examined him on oath with a view to ascertain his fitness as a surety. He was asked if he had ever been previously convicted of any offence; and he replied in the negative A previous conviction having been proved against him, he was tried for an offence under s. 193 of the Indian Penal Code. The High Court in upholding the conviction but modifying the sentence remarked: "We think that looking to the applicant's subsequent history it is to be regretted that the Magistrate allowed such a stale charge to be dragged to light, and that he would have shown a wiser discretion had he, according to the principle embodied in section 148 of the Evidence Act, refused to allow the question to be put on the ground that it related to a matter which had happened thirty years before and was so remote in time that it ought not to influence his decision as to the fitness of the surety. The applicant was apparently ashamed to admit an incident in his early years which he had apparently outlived, and having once denied his conviction he foolishly adhered to his denial."[4]

Question not to be asked without reasonable ground.

149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a*) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait

(*b*) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned to his mode of life and means of living, gives unsatisfactory answers This may be a reasonable ground for asking him if he is a dakait.

[1] Per Kelly, C.B., in *The Queen* v. *Holmes*, (1871) L. R. 1 C. C. R. 334, 336; *Rex* v *Hodgson*, (1812) R. & R. C. C. 211; *Rex* v. *Clarke*, (1817) 2 Stark. 241.

[2] *Rex* v. *Martin*, (1834) 6 C. & P. 562; *Reg.* v. *Cockcroft*, (1877) 11 Cox 410.

[3] *Rex* v. *Barker*, (1829) 3 C. & P. 589.

[4] *Emperor* v. *Ghulam Musta* (1904) 26 All 371, 374.

Procedure of Court in case of question being asked without reasonable grounds

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

COMMENT.

"The object of these sections is to lay down, in the most distinct manner, the duty of lawyers of all grades in examining witnessess with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public. . . .

"In order to protect witnesses against needless questions of this kind, we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall be guilty of a contempt of Court, and that the Court may record any such question, if asked by a party to the proceedings. The records of the question of the written instructions are to be admissible as evidence of the [illegible]
the reputation of [illegible]
to be regarded [illegible]
under any of the [illegible]
merely because they were made in the manner stated. Upon a trial for defamation, it would, of course, be open to the person accused to show, either that the imputation was true, and that it was for the public good that the imputation should be made (Excepn. 1, s. 499, Indian Penal Code), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Excepn. 9). This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness."[1]

Sections 148-152 were intended to protect a witness against improper cross-examination—a protection which is often very much required. But the protection offered by s. 148 is not very effectual, because an innocent man will be eager to answer the

[1] Proceedings of the Supreme Legislative Council, *Gazette of India*, pp. 237, 238; dated 30th March, 1872.

question, and one who is guilty will by a claim for protection merely confess his guilt. Nor does the threat contained in s. 149 and this section carry the matter much further.

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

COMMENT.

This section forbids the putting of any question which is indecent or scandalous, unless it relates to facts in issue or is necessarily connected with them.[1]

CASE.

In a proceeding to recover maintenance by a married woman for her illegitimate children, under s. 488 of the Criminal Procedure Code, she "can be examined to prove non-access of her husband during her married life without independent evidence being first offered to prove the illegitimacy of the children."[2]

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

COMMENT.

The Court has the power to forbid any question which is intended to insult or annoy, or which is couched in a needlessly offensive form.

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

1 Markby, 107.

2 Per Candy, J., in *Rosario* v. *Ingles*, (1893) 18 Bom. 468, 472.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the fact suggested, he may be contradicted.

Illustrations

(*a*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim He denies it.

Evidence is offered to show that he did make such a claim

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty He denies it

Evidence is offered to show that he was dismissed for dishonesty

The evidence is not admissible.

(*c*) A affirms that on a certain day he saw B at Lahore

A is asked whether he himself was not on that day at Calcutta He denies it.

Evidence is offered to show that A was on that day at Calcutta

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*) A is asked whether his family has not had a blood-feud with the family of B against whom he gives evidence

He denies it He may be contradicted on the ground that the question tends to impeach his impartiality

COMMENT.

The object of the section is to prevent trials being spun out to an unreasonable length. If every answer given by a witness upon the additional facts mentioned in s. 146 could be made the subject of fresh inquiry, a trial might never end. These matters are after all not of the first importance, beyond what is comprised in the exceptions.[1]

When a witness deposes to facts which are *relevant*, evidence may be given in contradiction of what he has stated. But when what he deposes to affects only his *credit*, no evidence to contradict him can be led for the sole purpose of shaking his credit by injuring his character. However, a witness answering falsely

[1] Markby, 108

A party to an action who calls an opponent as a witness has no [illegible] ever hostile he may be, without the [illegible] witness is a litigant or not, it is a [illegible] whether he shows himself so hostile as to justify his cross-examination by a party calling him.[1]

There is no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice; but the Court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter case.[2] The Court has the discretion, under this section, to permit the prosecution to test, by way of cross-examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross-examination.[3]

The Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination; as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or [illegible] or that particular answers have been given which have not been given, will not at any time be permitted.[4]

The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.[5]

CASES.

Hostile witnesses.—In a suit to recover moneys alleged to have been expended by the plaintiff in the performance of a ceremony, the plaintiff's witnesses having failed to prove any damages, he called the defendant as a witness, who gave evidence to the effect that the plaintiff had no claim. The Court refused to allow the plaintiff to cross-examine the defendant. It was held that the refusal to cross-examine was not justifiable.[6]

Certain witnesses for the prosecution were examined. The accused applied to the Court for an adjournment to enable them to cross-examine the witnesses by counsel. The application was refused, and the accused being called upon to cross-examine were not

[1] *Price* v. *Manning*, (1889) 42 Ch. D. 372; *Luchiram Motilal* v. *Radha Charan*, (1921) 49 Cal. 93.

[2] *Surendra Krishna Mondal*, v. *Rani Dassi*, (1920) 47 Cal. 1043.

[3] *Amrita Lal Hazra* v. *Emperor*, (1915) 42 Cal. 957.

[4] Taylor, 11th Edn., s. 1404. pp. 958, 959.

[5] *Kalachand Sircar* v. *Queen-Empress*, (1886) 13 Cal. 53.

[6] *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, (1869) 12 M. I. A. 380.

in a position to do so. The accused then applied that the witnesses should be summoned as witnesses for the defence. The witnesses were summoned, and, when the counsel for the accused proceeded to cross-examine them, he was not allowed to do so. It was held that the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character; that although the accused were compelled to obtain their attendance as witnesses for the defence, they were really summoned under s. 257 of the Code of Criminal Procedure "for the purpose of cross-examination," and the Magistrate was wrong in refusing to allow their cross-examination. The Court said: "To regard it otherwise would be to make the procedure of the Courts a mere travesty of justice."[1]

During the trial of a case, the accused obtained a process for the attendance of a witness. Before the witness appeared the accused asked the Court to countermand the order for his attendance, but the Court refused to do so When the witness attended, the accused declined to examine him. He was, thereupon, examined by the Court, and upon the accused claiming the right to cross-examine the witness, the Court refused to allow him to do so. It was held that under the circumstances the witness could not be regarded as a witness for the defence, and that the accused should have been given an opportunity to cross-examine him.

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but

[1] *Sheoprakash Singh* v. *Rawlins*, (1901) 28 Cal. 594, 596.

[2] *Mohendro Nath Das Gupta* v *Emperor*, (1902) 29 Cal. 387.

he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a*) A sues B for the price of goods sold and delivered to B.

C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B

The evidence is admissible

(*b*) A is indicted for the murder of B

C says that B, when dying, declared that A had given B the wound of which he died

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible

COMMENT.

Very often the Court forms its conclusion as to the truth or falsity of a claim only on the evidence of witnesses. This section

may be impeached: (*a*) by the adverse party, or (*b*) by the party who calls him, if permitted by the Court. They are:—

(1) Evidence of persons that the witness is unworthy of credit;

(2) proof that the witness (*i*) has been bribed; (*ii*) has accepted the offer of a bribe; or (*iii*) has received any other corrupt inducement;

(3) former statements inconsistent with the present evidence; and

(4) general immoral character of the prosecutrix in cases of rape or attempt to ravish.

The above sub-clause (*i*) has an explanation, which is a re-echo of s. 153. Witnesses deposing to character can be asked in cross-examination to give reasons for their opinion. They are not liable to be contradicted in those reasons; but, if they are false, they can be charged with giving false evidence.

The first three grounds are general. They indicate that the credit of a witness may be impeached, first of all, by the best of evidence, that is, his own former statements to the contrary; secondly, he can be shown to be unworthy of credit by the oral testimony of other persons; and, lastly, his credit can be completely overthrown by proving that he had accepted (*a*) a bribe, or (*b*) an offer of a bribe, or (*c*) any other corrupt inducement. The fourth ground is a special one. If the woman complaining of rape or at-

which the witness denies having made; and if the statement was at that time reduced into writing by the Police Officer, the officer would be allowed to refresh his memory by referring to it; but the written statement itself, when the statement has been reduced into writing......cannot be used as direct evidence of what was stated by the witness to the Police Officer."[1]

It is not, however, competent to the accused to insist that a memorandum made by the Police Officer shall, in the course of the examination of such officer, be referred to by the latter for the purpose of refreshing his memory.

CASES.

Clause 3.—In a suit by one K, claiming a share in a business as heiress of A, her father, the defendant pleading limitation, K, before the close of her case, put in evidence an entry in the Koran to shew t[illegible] she was born in 1279 [1863, A.D.], and in the cross-examination of M, a witness for the defence, put to him a letter pur-[illegible] case. Upon [illegible] words in the [illegible] nce in reply shewing that M had made statements to an attorney before the case inconsistent with his evidence, both as to the Koran and the letter. It was held that evidence might be given in reply as regards the Koran but not as regards the letter; no substantive evidence having [illegible]

was made to their employer and the other to the Head Constable. C was subsequently charged and these two persons were called as witnesses for the prosecution, but they then denied that C was one of the men who had assaulted them. Their previous statements were filed, but neither the employer nor the Head Constable was called to depose to the terms of the statements which the witnesses were said to have made. It was held that the former statements referred to, and which implicated the accused, could be used only under this clause for discrediting their evidence and not as substantive evidence against the accused.[4]

Certain statements relating to the commission of an offence were made by one J to H, and the latter took the information so obtained to an officer in charge of a Police Station and it was recorded. It was held that the statements recorded being a reproduction by the informant of the statements made to him by another person, were inadmissible as a first information. It was further held that

[1] Per Edge, C. J., and Banerji, J., in *Queen-Empress v. Taj Khan*, (1894) 17 All. 57, 60.

[2] *In the matter of the Petition of Kali Churn Chunari*, (1881) 8 Cal. 154.

[3] *Khadijah Khanum v. Abdool Kurreem Sheraji*, (1889) 17 Cal. 344

[4] *Emperor v. Cherath Choyi Kutti*, (1902) 26 Mad. 191.

though the evidence given in the case by J could be contradicted by the evidence of the informant H proving the statements made by J to H, it could not, under this clause, be contradicted by what the Police Sub-Inspector recorded as the first information of H.[1]

Clause 4.—See Comment under s. 138.

English law.—The rule of English law is that the credit of a witness may, amongst other ways, be impeached by evidence of facts contradictory of the evidence given by him. The express provision of the Indian law is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways (s. 155), that is, by *questions or by testimony going directly to his credit, not mediately* through a contradiction of the particular matter deposed to by him in the case.[2]

Questions tending to corroborate evidence of relevant fact admissible

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

COMMENT.

The Legislature has indicated (ss. 145, 153 and 158) how and when a witness may be *contradicted*. We have now to see in what circumstances a witness may be *corroborated*. First of all, he may be asked questions tending to corroborate evidence of a relevant fact (s. 156); secondly, former statements made by him may be proved to corroborate later testimony to the same fact (s. 157); thirdly, when any statement relevant under s. 32 or s. 33 is proved, all matters may be proved either to contradict or corroborate it (s. 158); and, lastly, he may refresh his memory by referring to writings made previously by him (s. 159). Like contradiction, corroboration is meant to test the truthfulness of a witness. If he is able to give a definite idea of the surrounding circumstances, his testimony thereby

[1] *The Emperor* v. *Dina Bandhu Moitra*, (1903) 8 C. W. N. 218.

[2] *Reg.* v. *Sakharam Mukundji*, (1874) 11 B. H. C. 166, 169.

Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration under s. 32, but it may be relied on, under this section, to corroborate the testimony of the complainant when examined in the case.[1]

As this section refers to the corroboration of the testimony of a "witness" ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given.[2]

English law.—The English law on this point is different. It does not admit such statements into evidence. The danger of letting them in lies in the fact that repetition of the same story over and over again ought not to gain in credence.[3]

CASES.

In 1874, five out of six persons who were named as having committed a murder were arrested, and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In 1886, the absconder was apprehended and tried before the Court of Session upon the charge of murder. Of the witnesses examined at the first trial, only one was living. He was examined and his deposition given in 1874 was also admitted. It was held by Straight, J., that under the special circumstances the deposition taken in 1874 of the surviving witness was admissible under this section as corroboration of her evidence given at the trial of the prisoner.[4]

Where the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers, it was held that a statement to that effect made by one of the plaintiffs in a deposition given long before the controversy in suit arose was admissible in evidence.[5]

A statement by a witness recorded by a Magistrate under s. 164 of the Criminal Procedure Code is admissible in evidence to corroborate the statement made by that witness before the Committing Magistrate and from which statement he resiles in the Sessions Court.[6] The Bombay High Court has held that such statement is not admissible in evidence.[7]

1 *Emperor* v. *Rama Sattu*, (1902) 4 Bom. L. R. 434.

2 *Nistarini Dassee* v. *Rai Nundo Lall Bose*, (1900) 5 C. W. N. xvi.

3 Taylor, 10th Edn., s. 1476, p. 1070.

4 *Queen-Empress* v. *Ishri Singh*, (1886) 8 All. 672.

5 *Jadu Nath Sarkar* v. *Mahendra Nath Rai Chowdhury*, (1907) 12 C. W. N. 266.

6 *Velliah Kone* v. *King-Emperor* (1922) 45 Mad. 766.

7 *Emperor* v. *Akbar Badoo*, (1910) 34 Bom. 599.

What matters may be proved in connection with proved statement relevant under section 32 or 33.

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

COMMENT.

This section deals with corroboration as well as contradiction. [illegible]

statements, oral or written, or statements made in a judicial proceeding, by a person who cannot be examined as a witness. The Legislature intends by this section to submit such statements to the self-same tests of contradiction and corroboration, in the same way as if those statements were made by the witness in the box.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration under s. 32, but it may be relied on, under this section, to corroborate the testimony of the complainant when examined in the case.[1]

As this section refers to the corroboration of the testimony of a "witness" ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given.[2]

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COMMENT.

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[illegible]

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When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Where a
statement car
under s. 32, b
rate the testimony of the complainant when examined in the case.[1]

As this section refers to the corroboration of the testimony of a " witness " ordinarily before corroborative evidence is admissible the evidence sought to be corroborated must have been given.[2]

English law.—The English law on this point is different. It does not admit such statements into evidence. The danger of letting them in lies in the fact that repetition of the same story over and over again ought not to gain in credence.[3]

CASES.

In 1874, five out of six persons who were named
mitted a murder were
were tried before the
of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In 1886, the absconder was apprehended and tried before the Court of Session upon the charge of murder. Of the witnesses examined at the first trial, only one was living. He was examined and his deposition given in 1874 was also admitted. It was held by Straight, J., that under the special circumstances the deposition taken in 1874 of the surviving witness was admissible under this section as corroboration of her evidence given at the trial of the prisoner.[4]

Where the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers, it was held that a statement to that effect made by one of the plaintiffs in a deposition given long before the controversy in suit arose was admissible in evidence.[5]

Magistrate and from which statement he resiles in the Sessions Court.[6] The Bombay High Court has held that such statement is not admissible in evidence.[7]

1 *Emperor* v. *Rama Sattu*, (1902) 4 Bom. L. R. 434.

2 *Nistarini Dassee* v. *Rai Nundo Lall Bose*, (1900) 5 C. W. N. xvi

3 Taylor, 10th Edn., s. 1476, p. 1070.

4 *Queen-Empress* v. *Ishri Singh*, (1886) 8 All. 672.

5 *Jadu Nath Sarkar* v. *Mahendra Nath Rai Chowdhury*, (1907) 12 C. W. N. 266.

6 *Velliah Kone* v. *King-Emperor* (1922) 45 Mad. 766.

7 *Emperor* v. *Akbar Badoo*, (1910) 34 Bom 599.

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

What matters may be proved in connection with proved statement relevant under section 32 or 33.

COMMENT.

This section deals with corroboration as well as contradiction. [illegible] ceeding, by a person who cannot be examined as a witness. The Legislature intends by this section to submit such statements to the self-same tests of contradiction and corroboration, in the same way as if those statements were made by the witness in the box.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Refreshing memory

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

When witness may use copy of document to refresh memory.

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

COMMENT.

One more way of allowing a witness to corroborate his testimony is to permit him to refresh his memory. He may, during his examination, refresh his memory—

(1) by referring to any writing made by himself at the time of the transaction concerning which he is questioned[1];

(2) by referring to any such writing made by any other person and read by the witness within the time aforesaid[2];

(3) by referring to professional treatises, if the witness is an expert (s. 159).

It is not necessary that the writing referred to should be one which is admissible in evidence. It is immaterial what the document is, whether it be a book of account, letter, tradesman's bill, notes made by the witness, or any other document which is likely to assist the memory of the witness.

It is not necessary that the witness should have specific re- [illegible]

[illegible] used [illegible]

The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are three-fold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts, (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement.[3]

The section says a witness *may* refresh his memory as stated. He is not bound to do so; and the accused cannot compel him to do it.[4]

It is very doubtful whether a Police Officer can refresh his memory as to statements recorded by him under s. 162 of the Criminal Procedure Code, unless the writing is already in and has been put to the witness who is alleged to have made the statements.[5]

CASES.

The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were re-instituted, and duplicate copies of the plaints were filed. The only evidence of the contents of the bonds, from which the plaints were prepared, consisted of a register kept by the plaintiff's clerk of the names of the executants of the bonds, the matter in respect of which the bonds had been given, the amounts due thereunder, and the names of the attesting witnesses. From this register the duplicate plaints had been prepared. It was held that though the register was not secondary evidence of the contents

1 *Mangham v. Hubbard*, (1828) 8 B. & C. 14.

2 *Burrough v. Martin*, (1809) 2 Camp. 112; *Abdul Salim v. Emperor*, (1921) 49 Cal. 573.

3 Per Field, J., in *In the matter of the Petition of Jhubboo Mahton*, (1882) 8 Cal. 739, 744.

4 *In the matter of the Petition of Kali Churn Chunari*, (1881) 8 Cal. 154.

5 Per Holmwood, J., in *Dadan Gazi v. The Emperor*, (1906) 10 C. W. N. 890, 894.

of the bonds, yet it was a document which might be referred to by a witness for the purpose of refreshing his memory, under this section.[1]

Collection papers.—The collection papers are no evidence *per se*, and can only be used when they are produced by a person who has collected rent in accordance with them and who merely uses them for the purpose of refreshing his memory.[2]

Jama-wasul-baki papers.—Jama-wasul-baki papers are not admissible as independent evidence of the amount of rent mentioned therein, but the person who has prepared them can refresh his memory from such papers when giving evidence as to the amount of rent payable.[3]

Unstamped document.—An insufficiently stamped promissory note can be used for the purpose of refreshing memory.[4]

Post-mortem examination reports.—A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence.[5]

Dying declaration.—The dying statement of a deceased person may be proved in the ordinary way by a person who heard it; and the writing may be used for the purpose of refreshing the witness's memory.[6]

Special diary.—*The special diary may be used by the Police Officer who made it, and by no witness other than such officer, for the purpose of refreshing his memory.*[7]

Statements made to the police.—*Statements made to the police and reduced to writing cannot be used as evidence; but may be used for the purpose of refreshing memory.*[8]

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

[1] *Taruck Nath Mullick* v. *Jeamat Nosya*, (1879) 5 Cal. 353.

[2] *Mahomed Mahmood* v. *Safar Ali*, (1885) 11 Cal. 407, 409.

[3] *Akhil Chandra Chowdhry* v. *Nayu*, (1883) 10 Cal. 248.

[4] *Birchall* v. *Bullough*, [1896] 1 Q. B. 325; *Maugham* v. *Hubbard*, (1828) 8 B. & C. 14.

[5] *Roghuni Singh* v. *The Empress*, (1882) 9 Cal. 455.

[6] *In the matter of the Petition of Samiruddin*, (1881) 8 Cal. 211.

[7] *Queen-Empress* v. *Mannu* (1897) 19 All. 390, F. B.

[8] *Reg.* v. *Uttamchand Kapurchand*, (1874) 11 B. H. C. 120; *Queen-Empress* v. *Sitaram Vithal*, (1887) 11 Bom. 657; *Roghuni Singh* v. *The Empress*, (1882) 9 Cal. 455; *Bhikao Khan* v. *The Queen-Empress*, (1889) 16 Cal. 610; *Sheru Sha* v. *The Queen-Empress*, (1893) 20 Cal. 642; *Emperor* v. *Stewart*, (1904) 31 Cal. 1050, 1053.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

COMMENT.

The principle of the foregoing section is carried a step further here. A witness may refresh his memory by a document even though he has *no specific* recollection of the facts themselves ; but he must be *sure* that the facts were *correctly recorded in the document.* If the witness had not correctly recorded the words used by the speaker but only his impression, then the notes made by him would be inadmissible to prove the words used.[1]

" In order that a document may be used as the refresher of memory, it is by no means necessary that the witness, after having seen it, should have any independent recollection of the facts mentioned therein, or connected therewith ; but it will suffice if he remembers that he has seen the paper before, and that, when he saw
[illegible] forgetting
[illegible] seen the
paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question.'

A witness may refresh his memory from a writing made by another person and inspected and signed by him, at the close of the day on which it was made, when it brings to his mind neither any recollection of the facts mentioned therein nor of the writing itself but when it nevertheless enables him to testify to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine.[3]

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it : such party *may, if he pleases, cross-examine the* witness thereupon.

COMMENT.

The opposite party may look at the writing to see what kind of writing it is in order to check the use of improper documents.

He has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to

1 Per Wallis, J., in *Mylapore Krishnasami v. Emperor,* (1909) 32 Mad. 384, 395.

2 Taylor, 11th Edn., s. 1412, p. 974

3 *Abdul Salim v. Emperor,* (1921) 49 Cal. 573.

4 Per Field, J., in *In the matter of the Petition of Jhubboo Mahton,* (1882) 8 Cal. 739, 745.

answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.[1]

"In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable—and if the witness has no independent recollection of the fact, it is necessary—that they should be produced at the trial, and that the opposite counsel should have an opportunity of inspecting them, in order that on cross or re-examination, he may have the benefit of the witness's refreshing his memory by every part. Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to; but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence."[2]

Production of documents

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State,[1] or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and, if the interpreter disobeys such direction, he shall be held to have committed an offence under s. 166 of the Indian Penal Code.

COMMENT.

Under the provisions of *O. XVI*, r. 6, of the *Civil Procedure Code*, a person may be summoned to produce a document without being summoned to give evidence. He may either attend the Court personally or may depute another to produce it. In neither case is he liable to be cross-examined (s. 139). If the document be in his possession or power, he is bound to bring the document with him to Court, notwithstanding any objection he may have to its production (*e.g.*, ss. 130-131 or ss. 126-129) or admissibility.

1 *In the matter of the Petition of Jhubboo Mahton*, (1882) 8 Cal. 739.

2 Taylor, 11th Edn., s. 141 965.

the matter before it, the Court will be able to look at and enquire into every fact whatever.[1] Each party in a case is interested in setting up his own case and demolishing the one set up by his adversary. There is danger in some cases that the whole truth may not come out before the Court. The Judge, in order to discover, or to obtain proper proof of, relevant facts, may exercise very wide powers indeed; but they all pivot upon the ascertainment of relevant facts. He may approach the case from any point of view, and is not tied down to the ruts marked out by the parties. He can ask (1) any question he pleases; (2) in any form; (3) at any time; (4) of any witness; (5) or of the parties; (6) about any fact relevant or irrelevant. No party is entitled to object to any such question or order, or to cross-examine the witness without the leave of the Court. But out of the evidence so brought out, the Judge can only use that which is relevant and duly proved. There are three exceptions to the very wide powers given to the Judge. The witness cannot be compelled to answer (1) any question or to produce any document contrary to ss. 121 to 131; or (2) any question contrary to s. 148 or 149; and (3) the Judge shall not dispense with primary evidence of any document except as provided before.

In civil as well as in criminal proceedings the Legislature has vested ample powers in the Courts to exercise this power (Civil Procedure Code, O. X, rr. 2, 4; O. XVI, r. 14; Criminal Procedure Code, s. 540).

"When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant....; and he is, therefore, at the same time, placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, but this cannot be asked for as a matter of right. This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control."[2]

"In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more

[1] Stephen, 162.

[2] Per West, J., in *Reg. v. Sakharam Mukundji*, (1874) 11 B. H. C. 166, 168.

distinctly than he does in England. In many cases he has to get at the truth, *or as near to it as he can, by the aid of collateral inquiries*, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arr
any questions, upon any facts,
proceedings, irrespectively of t
parties and their agents, and we have inserted in the bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in

England
sar him
by the
facts actually stand. In order to do this it will frequently be necessary for him to go into matters which are not themselves relevant *to the matter in issue, but may lead to something that is, and it is* in order to arm Judges with express authority to do this that this section has been framed."[1]

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138.[2]

There is nothing in this section debarring or disqualifying a party to a proceeding from cross-examining any witness called by the Court. All that the section says is that a party to a proceeding should not be allowed to cross-examine a witness upon an answer

to the suit.[4] *The accused should be given an opportunity to cross-examine him.*[5]

During police investigation the examination of an accused by a Magistrate by way of cross-examination is improper.

1 Proceedings of the Legislative Council.

2 Per Garth, C. J., in *Noor Bux Kazi* v. *The Empress*, (1880) 6 Cal. 279, 283.

3 *Gopal Lall Seal* v. *Manick Lall Seal*, (1897) 24 Cal. 288, 290.

4 *Tarini Charan Chowdhry* v. *Saroda Sundari Dasi*, (1869) 3 B. L. R. (A. C.) 145.

5 *In the matter of the Empress* v *Grish Chunder Talukdar*, (1879) 5 Cal. 614; *Mohendro Nath Das Gupta* v. *Emperor*, (1902) 29 Cal. 387.

the matter before it, the Court will be able to look at and enquire into every fact whatever.[1] Each party in a case is interested in setting up his own case and demolishing the one set up by his adversary. There is danger in some cases that the whole truth may not come out before the Court. The Judge, in order to discover, or to obtain proper proof of, relevant facts, may exercise very wide powers indeed; but they all pivot upon the ascertainment of relevant facts. He may approach the case from any point of view, and is not tied down to the ruts marked out by the parties. He can ask (1) any question he pleases; (2) in any form; (3) at any time; (4) of any witness; (5) or of the parties; (6) about any fact relevant or irrelevant. No party is entitled to object to any such question or order, or to cross-examine the witness without the leave of the Court. But out of the evidence so brought out, the Judge can only use that which is relevant and duly proved. There are three exceptions to the very wide powers given to the Judge. The witness cannot be compelled to answer (1) any question or to produce any document contrary to ss. 121 to 131; or (2) any question contrary to s. 148 or 149; and (3) the Judge shall not dispense with primary evidence of any document except as provided before.

In civil as well as in criminal proceedings the Legislature has vested ample powers in the Courts to exercise this power (Civil Procedure Code, O. X, rr. 2, 4; O. XVI, r. 14; Criminal Procedure Code, s. 540).

"When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant....; and he is, therefore, at the same time, placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, [illegible]

them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control."[2]

"In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more

[1] Stephen, 162.
[2] Per West, J., in *Reg* v *Sakha*[illegible]*ram Mukundji*, (1874) 11 B. H. C. 166, 168.

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"In India, in an enormous mass of cases, it is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that this section has been framed."[1]

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138.[2]

There is nothing in this section debarring or disqualifying a party to a proceeding from cross-examining any witness called by the Court. All that the section says is that a party to a proceeding should not be allowed to cross-examine a witness upon an answer given by him to a question put by the Court without the permission [illegible] was that [illegible] ie parties [illegible] to cross-examine him.[5]

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In this course of a police investigation a Magistrate is entitled to record (under s. 164, Criminal Procedure Code), any voluntary statement made by the accused person but he is not entitled to examine the accused person in respect of the facts of the case.[1]

Proviso 1.—This proviso says that the judgment must be based upon facts declared by this Act to be relevant (ss. 5-55) and duly proved (ss. 56-100). The Judge will not be permitted to found his judgment upon the class of statements to which he may resort as indicative evidence, for the reason that it would tempt judges to be satisfied with second-hand reports, would open a wide door to fraud, and would waste an incalculable amount of time.[2]

Proviso 2.—This proviso subjects the Judge to the provisions contained in ss. 121-131, s. 148 and s. 149. The Judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof of relevant facts, but if he asks questions with a view to criminal proceedings being taken against the witness, the witness is not bound to answer them, and cannot be punished for not answering them under s. 179, Indian Penal Code.[3]

Consent of parties renders admissible the evidence given in a previous judicial proceeding.—Evidence recorded in a previous judicial proceeding between the same parties is admissible in a subsequent proceeding by the consent of both parties.[4] Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want

Clause 2.—The proof of a previous conviction not contemplated by s. 75 of the Indian Penal Code may be adduced after the accused is found guilty, provided the previous conviction is relevant under the Indian Evidence Act.[6]

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors, may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

1 *Gya Singh* v. *Mohamed Soliman*, (1901) 5 C. W. N. 864, 865, 866.

2 Stephen, 162, 163.

3 *Queen-Empress* v. *Hari Lakshman*, (1885) 10 Bom. 185.

4 *Jainab Bibi Saheba* v. *Hyderally Sahib*, (1920) 43 Mad. 609, F. B.; *Ponnuswami Pillai* v. *Singaram Pillay*, (1918) 41 Mad. 731, overruled

5 *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao*, (1912) 38 Mad. 160

6 *Emperor* v. *Ismail Alikhan*, (1914) 16 Bom. L. R. 934.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for improper admission or rejection of evidence

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case,[1] if it shall appear to the Court before which such objection is raised[2] that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected[3] evidence had been received, it ought not to have varied the decision.

COMMENT.

The improper *admission*, or *rejection* of evidence

is no ground for

a new trial, or *reversal of any decision*

if

(*a*) in case of *improper admission*—

there is sufficient evidence to justify the decision, independently of the evidence objected to and admitted ; or

(*b*) in case of *improper rejection*—

the decision could not be varied, if the rejected evidence had been received.

The object of the section is that the Court of Appeal or Revision will not disturb a decision on the ground of improper *admission* or *rejection* of evidence, if in spite of such evidence, there are sufficient materials in the case to justify the decision.[1] In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done.

Civil and criminal cases.—The provisions of the section are made applicable by the clearest possible words to all judicial proceedings in or before any Court.[2] It applies to civil cases ; and to criminal cases whether or not the trial has been had before a jury.[3] If the nature of the mischief which the section was intend-

[1] See the observations of the Privy Council in *Mohur Sing* v. *Ghurība*, (1870) 6 B. L. R. 495, 499

[2] Per Sargent, C. J., in *Reg* v. *Navroji Dadabhai*, (1872) 9 B H. C 358, 374.

[3] Per Westropp, C. J., in *Imperatrix* v *Pitamber Jina*, (1872) 2 Bom. 61, 65.

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Consent of parties renders admissible the evidence given in a previous judicial proceeding.—Evidence recorded in a previous judicial proceeding between the same parties is admissible in a subsequent proceeding by the consent of both parties.[4] Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of Appeal.[5]

Clause 2.—The proof of a previous conviction not contemplated by s. 75 of the Indian Penal Code may be adduced after the accused is found guilty, provided the previous conviction is relevant under the Indian Evidence Act.[6]

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[1] *Gya Singh* v. *Mohamed Soliman*, (1901) 5 C. W. N 864, 865, 866.

[2] Stephen, 162, 163

[3] *Queen-Empress* v. *Hari Lakshman*, (1885) 10 Bom. 185.

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OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for improper admission or rejection of evidence

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case,[1] if it shall appear to the Court before which such objection is raised[2] that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected[3] evidence had been received, it ought not to have varied the decision.

COMMENT.

The improper *admission*, or *rejection* } of evidence

is no ground for

a new trial, or *reversal of any decision*

if

(*a*) in case of *improper admission*—

there is sufficient evidence to justify the decision, independently of the evidence objected to and admitted ; or

(*b*) in case of *improper rejection*—

the decision could not be varied, if the rejected evidence had been received.

The object of the section is that the Court of Appeal or Revision *will not disturb a decision on the ground of improper admission* or *rejection* of evidence, if in spite of such evidence, there are sufficient materials in the case to justify the decision.[1] In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done.

Civil and criminal cases.—The provisions of the section are made applicable by the clearest possible words to all judicial proceedings in or before any Court.[2] It applies to civil cases ; and to criminal cases whether or not the trial has been had before a jury.[3] If the nature of the mischief which the section was intend-

[1] See the observations of the Privy Council in *Mohur Sing* v *Ghurba*, (1870) 6 B L. R. 495, 499

[2] Per Sargent, C. J., in *Reg.* v. *Navroji Dadabhai*, (1872) 9 B. H. C. 358, 374.

[3] Per Westropp, C. J., in *Imperatrix* v. *Pitamber Jina*, (1872) 2 Bom. 61, 65

ed to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings.[1]

Civil.—In the case of *first appeals*, the provisions of this section have to be read with s. 99 of the Civil Procedure Code (Act V of 1908), which provides: " No decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of....any error, defect or irregularity in any proceedings in the suit not affecting *the merits of the case*...." See also O. XLI, rr. 27 to 29.

In *second appeals*, one of the grounds justifying the appeal is " a substantial error or defect in the procedure....which may possibly have produced *error or defect in the decision of the case upon the merits* " [s. 100 (1) (c) of the Civil Procedure Code of 1908].[2]

There is, however, a great difficulty in applying the provisions

[illegible]

to entertain questions of law. Its duty being thus confined, when evidence has been wrongly admitted by the Court below, the High Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below. The only cases which it may with propriety dispose of under such circumstances without a remand, are those, where independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds.[3]

Where the first Court improperly admitted evidence the High Court interfered and remanded the case for new trial.[4]

The omission to receive an important document[5] or to examine a material witness[6] justifies a reversal of the decision.

Criminal.—In criminal cases also the Legislature has provided a similar safeguard. " No finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered....on appeal or revision, on account....of any misdirection in any charge to the jury unless such error, omission, irregularity, want or misdirection has in fact occasioned *a failure of justice* [s. 537 (d) of the Criminal Procedure Code.]

When a part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible, it is open to

1 Per Garth, C. J. in *Queen* v. *Hurribole Chunder Ghose*, (1876) 1 Cal. 207, 216; *Emperor* v. *Panchu Das*, (1920) 47 Cal. 671, F. B.

2 *Babu Gomes* v. *Idoo Mian*, (1914) 19 C. W. N. 1148.

3 Per Garth, C. J. in *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry*, (1881) 7 Cal. 293, 296.

4 *Palakdhari Rai* v. *Manners*, (1895) 23 Cal. 179.

5 *Devidas Jagjivan* v. *Pirjada Begam*, (1884) 8 Bom. 377; *Talewar Singh* v. *Bhagwan Das*, (1907) 12 C. W. N. 312, 8 C. L. J. 147.

6 *Moni Lal Bandopadhya* v. *Khiroda Dasi*, (1893) 20 Cal. 740.

the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under this section or to quash the verdict and order a retrial.[1]

Letters Patent, cl. 26.—The provisions of this section apply to the High Court when acting under cl 26 of the Letters Patent.[2] Section 12 of the Lower Burma Courts Act is *similar to* this clause, and this section therefore applies to proceedings under it.[3]

1. 'In any case.'—These words are very wide and include criminal trials by jury.[4]

2. 'The Court before which such objection is raised.'—The Court which is to decide upon the sufficiency of the evidence to support the conviction is the Court of Review or the Appellate Court,[5] but not the Court below.[6]

3. 'Decision.'—The word 'decision' is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases ; and, if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better.[7]

English law.—The English law upon the subject is contained in O. XXXIX, r. 6, Rules of the Supreme Court, the material portion of which runs as follows :—

"A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned at the trial."

It will be seen from the Order [illegible] the Indian, on two points : first, th [illegible] [illegible] the section the decision may also be reversed.

[1] *Queen-Empress* v. *Ramchandra Govind Harshe*, (1895) 19 Bom 749; Contra, *Wafadar Khan* v. *Queen-Empress*, (1894) 21 Cal. 955. *Dal Singh* v. *Emperor*, (1917) 19 Bom. L. R. 510, P. C.; *Ramesh Chandra Das* v. *Emperor*, (1919) 46 Cal. 895.

[2] *Queen* v. *Hurribole Chunder Ghose*, (1876) 1 Cal. 207; *Imperatrix* v *Pitamber Jina*, (1877) 2 Bom. 61; *Emperor* v. *Narayen*, (1907) 9 Bom. L. R. 789, 32 Bom. 111, F. B. See *Emperor* v. *Panchu Das*, (1920) 47 Cal. 671, F. B.

[3] *Thein Myin* v. *King-Emperor*, (1917) 9 L. B. R. 60, F. B.

[4] Per Jardine, J., in *Queen-Empress* v. *Ramchandra Govind Harshe*, (1895) 19 Bom 749, 762.

[5] Per Westropp, C. J., in *Imperatrix* v. *Pitamber Jina*, (1877) 2 Bom. 61, 65.

[6] Per Garth, C J., in *Queen* v. *Hurribole Chunder Ghose*, (1876) 1 Cal. 207, 217.

[7] *Ibid.*

ENACTMENTS REPEALED.

(*See Section* 2.)

Number and year	Title	Extent of repeal.
Stat 26 Geo III, cap 57	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of His present Majesty (intituled "An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies") as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies.
Stat 14 & 15 Vic, cap 99	To amend the Law of Evidence.	Section 11 and so much of section 19 as relates to British India.
Act XV of 1852.	To amend the Law of Evidence.	So much as has not been heretofore repealed.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section 19
Act II of 1855	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed
Act XXV of 1861.	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter	Section 237.
* * * *	* * * * * *	* * * *

SUMMARY.

The law of evidence is the most important branch of adjective law. It is to legal practice what logic is to all reasoning. Without it, trials might be infinitely prolonged, to the great detriment of the public, and the vexation and expense of suitors. It is by this that the Judge separates the wheat from the chaff

safety among the burning ploughshares of perjury, forgery, and fraud that beset his footsteps, and to rest his judgment on a basis of probabilities at least comparatively satisfactory to his own mind.[1]

Before the passing of the Indian Evidence Act the principles of the English law of evidence were followed by Courts in India in presidency towns. In the mofussil towns Mahomedan law of evidence was followed for some time by British Courts, but subsequently various Regulations dealing with principles of evidence were passed for the guidance of mofussil Courts Act II of 1855 partially codified the law of evidence But it did not affect the practice in vogue in mofussil Courts In 1868 Mr. (afterwards Sir Henry Summer) Maine prepared a Draft Bill of the Law of Evidence, but it was abandoned as not suited to the country In 1871 Mr. (afterwards Sir James Fitz James) Stephen prepared a new draft which was passed as Act I of 1872.

The Indian Evidence Act has codified the rules of English law of evidence with such modifications as are rendered necessary by the peculiar circumstances of this country. But the Act is not exhaustive, and cases do arise for the solution of which principles of common law are resorted to. The Code, though chiefly drawn upon the lines of the English law of evidence, was not intended to be a servile copy of it.

The object of codification is that, on any point specifically dealt with by an Act, the law should be ascertained by interpreting its language, instead of, as before, roaming over a vast number of authorities to discover what the law is, and extracting it by a critical examination of the prior decisions.[2]

One great object of the Evidence Act was to prevent laxity in the admissibility of evidence, and to introduce a more correct and uniform rule of practice than was previously in vogue. The

[1] Norton.

[2] *Bank of England* v. *Vagliano*, [1891] A C. 107.

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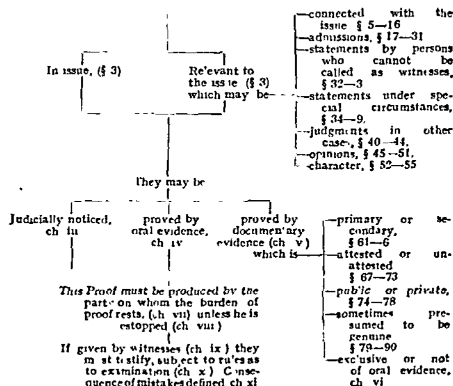
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[1] Norton. [1891] A. C. 107.
[2] *Bank of England v. Vagliano.*

Evidence Act is not intended to do more than prescribe rules for the admissibility or otherwise of evidence on the issue as to which the Courts have to record findings.

The main principles which underlie the law of evidence are: (1) evidence must be confined to the matters in issue; (2) hearsay evidence must not be admitted; and (3) the best evidence must be given in all cases

The following tabular scheme[1] sufficiently explains the general arrangement of the Indian Evidence Act.—



The Evidence Act is divided into three Parts comprising eleven Chapters. Part I consists of two Chapters dealing with *definitions and relevancy of facts*. Part II *comprises* Chapters III to V which provide for proof of facts by oral or documentary evidence. Part III embodies Chapters VI to XI which contain rules or the production of evidence in Court and the duties of the Court in dealing with the evidence produced before it.

1 Stephen's Introduction, p. 12.

PART I.

Relevancy of Facts.

Chapter I deals with definitions of various terms.

'Evidence' means and includes—

(1) Oral evidence, *i.e.*, all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.

(2) Documentary evidence, *i.e.*, all documents produced for the inspection of the Court.

Evidence may be given in any suit or proceeding (A) of every fact in issue, and (B) of relevant facts (s. 3).

(A) **'Fact.'**—It means and includes—(1) any thing, state of things, or relation of things, capable of being perceived by the senses; (2) any mental condition of which any person is conscious (s. 3).

The expression 'facts in issue' means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding necessarily follows (s. 3).

(B) **Relevant fact.**—One fact is said to be relevant to another when the one is connected with the other in any of the ways relating to the relevancy of facts (s 3).

Presumptions.—The topic of 'presumptions' has been referred to in s. 4. A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Presumptions are divided into presumptions of fact ("may presume" of the Evidence Act) and presumptions of law. Presumptions of law are again sub-divided into presumptions of law *absolute* or *conclusive* ("conclusive proof" of the Evidence Act, and presumptions of law *disputable* or *rebuttable* ("shall presume" of the Evidence Act).

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'may presum [illegible]

unless and until i [illegible]

'shall presume' a fact, it shall regard such fact as proved, unless and until it is disproved.

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given [illegible] purpose of disproving it (s. 4).

Chapter II.—What facts are relevant.—The following facts are relevant.—

1. Facts so connected with a fact in issue as to form part of the same transaction (s. 6).

2. Facts which are the occasion, cause, or effect, of relevant facts or facts in issue (s 7).

3. Facts showing a motive or preparation for, or previous or subsequent conduct in relation to, any fact in issue or relevant fact (s. 8)

4 Facts (1) necessary to explain or introduce a fact in issue or relevant fact, or (2) which support or rebut an inference suggested by such a fact, or (3) which establish the identity of any thing or person whose identity is relevant, or (4) which fix the time or place at which any fact in issue or relevant, happened, or (5) which show the relation of parties by whom any such fact was transacted (s. 9).

5 Anything said, done or written by a conspirator in *reference to the common intention of all the conspirators (s. 10).*

6. Facts (1) that are inconsistent with any fact in issue or relevant fact; or (2) which make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable (s 11).

7. Facts which will enable the Court to determine the amount of damages which ought to be awarded (s. 12).

8. Where the question is as to the existence of any right or custom—(1) any *transaction* by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence; (2) particular instances in which the right or custom was (*a*) claimed, recognised or exercised, or (*b*) disputed, asserted, or departed from (s. 13).

9. Facts showing the existence of any state of (1) mind (*e.g.*, intention, knowledge, good faith, negligence, rashness, ill-will, good-will), (2) body, or (3) bodily feeling, when such state of mind or body is relevant (s. 14).

10. When the question is whether an act was accidental or intentional—the fact that it formed part of a series of similar occurrences (s. 15).

11. Existence of any course of business according to which an act regarding which there is a question would have been done (s. 16).

Sections 17-55 deal with statements which are relevant under certain circumstances. These include—

I. Admissions.
II. Confessions.
III. Statements by persons who cannot be called as witnesses.
IV. Statements under special circumstances.
V. Judgments of Courts.

VI. Opinions of third persons.

VII. Character of parties.

I. Admissions.—The Evidence Act deals with admissions as follows :—

1. An admission is a statement, oral or documentary, which suggests any inference, as to any fact in issue or relevant fact, and which is made by—

(*i*) a party to the proceeding ;

(*ii*) an agent authorised by such party ;

(*iii*) a party suing or sued in a representative character making admissions while holding such character ,

(*iv*) a person who has a proprietary or pecuniary interest in the subject-matter of the suit during the continuance of such interest ,

(*v*) a person from whom the parties to the suit have derived their interest in the subject-matter of the suit during the continuance of such interest (s. 18) ;

(*vi*) a person whose position it is necessary to prove in a suit, if such statements would be relevant in a suit brought by or against himself (s 19) ,

(*vii*) a person to whom a party to the suit has expressly referred for information (s. 20).

2. An admission is relevant and may be proved as against the person who makes it or his representative in interest It cannot be proved by or on behalf of the person who makes it or by his representative, except in three cases—

(*a*) when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32;

(*b*) when it consists of a statement of the existence of any state of mind or body made at or about the time when such state of mind or body existed and is accompanied by conduct rendering its falsehood improbable ;

(*c*) if it is relevant otherwise than as an admission (s. 21).

3. Oral admissions as to contents of a document are not relevant unless (1) the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document, or (2) the genuineness of the document produced is in question (s. 22). According to English law such admissions may be used as proof.

4. An admission is not relevant in a civil case if it is made (1) upon an express condition that evidence of it is not to be given, or (2) under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given (s. 23). A barrister, pleader, attorney or vakil is not exempted from giving evidence of any matter of which he may be compelled to give evidence under s. 126 (s. 23, expln.).

5. An admission is not a conclusive proof of the matter admitted, but it may operate as estoppel (s. 31).

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(*v*) a person from whom the parties to the suit have derived their interest in the subject-matter of the suit during the continuance of such interest (s. 18),
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II. Confessions.—The law of confessions is laid down as follows:—

1. A confession is irrelevant (1) if it is obtained by any (*a*) inducement, (*b*) threat, or (*c*) promise (2) having reference to the c[illegible] and (4) sufficient to g[illegible] by making it he [illegible] a temporal nature [illegible] m (s. 24).

But a confession made after the removal of the impression caused by such inducement, threat or promise, is relevant (s. 28).

2. A confession made to a police officer is not admissible (s 25).

3. A confession made by a person in police custody is not admissible, unless it is made in the presence of a Magistrate (s 26).

But when any fact is discovered in consequence of information received from such person, so much of the information as relates to the facts discovered is admissible (s. 27).

4. A confession does not become irrelevant if it is made—

(*i*) under a promise of secrecy; or

(*ii*) in consequence of a deception practised on the accused; or

(*iii*) when the accused was drunk, or

(*iv*) in answer to questions which the accused need not have answered; or

(*v*) when the accused was not warned that he was not bound to make it (s. 29).

5. When more persons than one are tried jointly for an offence, and one of them makes a confession affecting himself and any other of such persons, the confession may be taken into consideration against such other person as well as against the person making it (s. 30).

III.—Statement by a witness who cannot be produced—
Statements of relevant facts made by a person—

(*a*) who is dead;

(*b*) who cannot be found;

(*c*) who has become incapable of giving evidence;

(*d*) whose attendance cannot be procured without unreasonable delay or expense

are relevant under the following circumstances:—

(1) When it relates to the cause of his death.

(2) When it is made in the course of business; such as entry in books, or acknowledgment or the receipt of any property, or date of a document.

(3) When it is against the pecuniary or proprietary interest of the person making it or when it would have exposed him to a criminal prosecution.

(4) When it gives opinion as to public right or custom or matters of general interest and it was made before any controversy as to such right or custom had arisen.

(5) When it relates to the existence of any relationship between persons as to whose relationship the maker had special means of knowledge and was made before the question in dispute arose.

(6) When it relates to the existence of any relationship between persons deceased and is made in any will or deed or family pedigree, or upon any tombstone or family-portrait, and was made before the question in dispute arose

(7) When it is contained in any deed, will, or other document.

(8) When it is made by a number of persons and expresses feelings relevant to the matter in question (s 32).

IV.—Statements made under special circumstances.—There are statements which are relevant under special circumstances These are—

1. Entries in books of account regularly kept in the course of business, such entries shall not alone be sufficient evidence to charge any person with liability (s. 34).

2. Entries in public or official books or records made by a public servant or by a person enjoined by law in the discharge of his duty (s. 35).

3. Statements made in maps or charts offered for public sale or in maps or plans made under the authority of Government (s. 36).

4. Statements of facts of public nature made in (1) Acts of Parliar [illegible] ıl Legislative ([illegible] ı or the Gazett([illegible] *Gazette* (s. 37).

[illegible] ountry contained in (1) a book [illegible] ıe Government of that country, [illegible] of the Courts of such country (s. 38).

When the evidence to be given forms part of a statement, conversation, document, book or series of *letters or papers*, so much of the statement, etc., as the Court considers necessary to the full understanding of the nature and effect of the statement, shall only be given (s. 39).

V. Judgments.—Judgments are relevant facts of great importance. Judgments in civil cases do not preclude any one but parties to the suit or their representatives from contesting the subject-matter upon which they are pronounced. There are four exceptions to this principle.

1. The existence of a judgment, decree or order is a relevant fact if it by law has the effect of preventing any Court from taking cognizance of a suit, or holding a trial (s. 40).

2 A final judgment of a Court exercising (1) probate, (2) matrimonial, (3) admiralty, or (4) insolvency jurisdiction which

(i) confers upon or takes away from any person any legal character or,

(ii) declares any person to be entitled to (*a*) any such character, or (*b*) any specific thing absolutely

is *relevant* when (*a*) the existence of any such legal character or (*b*) the title of any such person to any such thing is relevant.

Such judgment is *conclusive* proof

(1) that any legal character, which it confers, accrued at the time when such judgment came into operation;

(2) that any legal character to which it declares any person to be entitled accrued at the time mentioned in the judgment.

(3) that any legal character which it takes away from any person ceased at the time mentioned in the judgment;

(4) that any thing to which it declares a person to be entitled was that person's property at the time at which the judgment declares to be his (s 41)

3 Judgments relating to matters of a public nature are relevant though such judgments are not conclusive proof of that which they state (s. 42).

4. Judgments, the existence of which is a fact in issue or is relevant under some other provision of the Evidence Act (s. 43).

Any party to a suit may show that a judgment which is relevant was delivered by a Court not competent to deliver it or was obtained by fraud (s 44).

VI. Opinions.—Often the Court has to form an opinion on technical matters and extraneous assistance is necessary. The Act allows such opinion in the following cases.—

1. Opinion of experts, *i.e.*, persons skilled in (i) foreign law, (ii) science, (iii) art, (iv) handwriting, and (v) finger impressions (s. 45).

2. Any fact which supports or is inconsistent with the opinion of experts (s. 46).

3. Opinion of a person acquainted with the handwriting of the person by whom a document is written when the Court has to form an opinion as to the person by whom it was written (s. 47).

A person is said to be acquainted with the handwriting of another person when (i) he has seen that person write; (ii) he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person; (iii) in the ordinary course of business,

documents purporting to be written by that person have been habitually submitted to him (*ibid*).

4. Opinion as to the existence of a right or custom of a person who knows of its existence (s. 48).

5 Opinions of persons having special means of knowledge regarding (i) usages and tenets of a body of men or family; (ii) the constitution and government of any religious or charitable foundation, (iii) the meaning of words or terms used in particular districts or by particular classes of people (s. 49).

6. Opinion as to the relationship of one person to another of a person, expressed by his conduct, who as a member of the family has special means of knowledge on the subject (s. 50).

Whenever the opinion of a person is relevant, the grounds on which such opinion is based are also relevant (s. 51).

VII. Character.—'Character' includes both reputation and disposition. Relevancy of character may arise either in (1) civil, or (2) criminal cases.

(1) In civil cases the fact that the character of any person is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant (s. 52).

But the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant (s. 55).

(2) In criminal cases the fact that the accused is of *good character* is relevant (s. 53). But the fact that he is of *bad character* is irrelevant unless—

(i) evidence has been given that he has a good character (s. 54); or

(ii) bad character is itself a fact in issue (s. 54, expln. 1).

A previous conviction is relevant as evidence of bad character (*ibid*, expln. 2).

PART II.

ON PROOF.

Chapter III.—Facts which need not be proved.—These are:—

1. Facts of which the Court will take judicial notice (s. 56). Section 57 enumerates thirteen facts of which the Court must take judicial notice.

2. Facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which, by any rule of pleading, they are deemed to have admitted by their pleadings (s. 58).

1. The existence of a judgment, decree or order is a relevant fact if it by law has the effect of preventing any Court from taking cognizance of a suit, or holding a trial (s. 40).

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PART II.

On Proof.

Chapter III.—Facts which need not be proved.—These are:—

1. Facts of which the Court will take judicial notice (s. 56). Section 57 enumerates thirteen facts of which the Court must take judicial notice.

2. Facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which, by any rule ing, they are deemed to have admitted by their

1. One attesting witness at least must be called for proving its execution, if such witness is (i) alive, (ii) subject to the process of the Court, and (iii) capable of giving evidence (s. 68).

2. If such witness cannot be found or if the document is executed in the United Kingdom, it must be proved—

(i) that the attestation of a witness is in his handwriting, and

(ii) that the signature of the person executing the document is in the handwriting of that person (s. 69).

3. The admission of a party to an attested document of its execution by himself is sufficient proof of its execution as against him (s. 70).

4. If the attesting witness denies or does not recollect the execution of the document, the execution may be proved by other evidence (s. 71), *i.e.*, it may be proved under ss. 69 and 70.

An attested document, not required by law to be attested, may be proved as if it was unattested (s. 72).

In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, proved to have been written or made by that person, may be compared with the one which is to be proved (s. 73).

Public documents.—These are (1) documents forming the acts or records of the acts

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public offices, legislative, judicial and executive, whether in British India or other portions of His Majesty's Dominions, or a foreign country.

2. Public records kept in British India of private documents (s. 74).

All other documents are private (s. 75).

Certified copies of public documents will be given by every public officer having the custody of them on payment of legal fees (s. 76). Such copies may be produced in proof of the contents of the public documents of which they purport to be copies (s. 77). Certain public documents are proved in special ways, and not by certified copies, *e.g.*, Acts or Notifications of Government, proceedings of Legislatures, Proclamations, Acts of foreign countries, proceedings of municipal bodies, public documents of foreign countries (s. 78).

Presumption as to documents.—Sections 79-85 and s. 89 provide for cases in which the Court *shall* presume certain facts about documents, that is, the Court is bound to accept those facts as proved until they are disproved.

1. The Court shall presume to be genuine a certificate, a certified copy or other document which is declared by law to be

admissible as proof of any fact, and which purports to be certified by an officer in British India or by any authorised officer in any Native State in alliance with His Majesty. It shall also presume that the officer who signed or certified it held at the time the official character which he claims in it (s. 79).

2. As to (1) a record of evidence in a judicial proceeding, or (2) a confession taken in accordance with law and purporting to be signed by a Judge or Magistrate or other officer authorised by law, the Court shall presume (i) that the document is genuine; (ii) that any statement as to the circumstances under which it was taken is true, and (iii) that such evidence or confession was duly taken (s. 80).

3. As to the *London Gazette*, the *Gazette of India*, the *Gazette* of any Local Government or colony, a newspaper, a private Act of Parliament printed by the King's Printer, or a document coming from proper authority, the Court shall presume that it is genuine (s 81).

4. As to a document which would be admissible in an English or Irish Court (1) without proof of its seal or stamp or signature or (2) of the official character of the person signing it, the Court shall presume (i) that the seal, etc, is genuine, and (ii) that the person signing it held the official position which he claims in it (s. 82).

5. As to maps or plans purporting to be made by the authority of Government, the Court shall presume that they were so made and are accurate (s. 83).

6. As to (1) authorised law-books containing laws of any country and (2) books purporting to contain reports of decisions of Courts of such country, the Court shall presume that they are genuine (s 84).

7. As to powers of attorney executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or representative of the Government of India, the Court shall presume that they were so executed and authenticated (s. 85).

8. As to a document called for and not produced after notice to produce, the Court shall presume that it was duly attested, stamped and executed (s. 89).

Sections 86-88 and 90 provide for cases in which the Court *may* presume certain facts about documents, that is, the Court is at liberty to accept those facts as proved until they are disproved, or to call for proof of them in the first instance.

1. As to a certified copy of any judicial record of a foreign country, certified by a representative of His Majesty or of the Government of India, the Court may presume that it is genuine and accurate (s. 86).

2. As to (1) any book to which the Court may refer on matter of public or general interest, and (2) any published ch

or map produced for its inspection, the Court may presume that it was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published (s. 87).

3. As to a message forwarded from a telegraph office, the Court may presume that it corresponds with the message for transmission at the office from which it purports to be sent. But it shall not make any presumption as to the person by whom such message was delivered for transmission (s. 88).

4. As to a document proved to be thirty years old and produced from proper custody, the Court may presume (1) that the signature and every other part of such document, which *purports to be in the handwriting of any particular person, is* in that person's handwriting, and (ii) that it was duly executed and attested by the persons by whom it purports to be executed and attested (s. 90).

Documents are in proper custody if they are (1) in the place in which, and (2) under the care of the person with whom, they would naturally be (*ibid*).

Chapter VI.—Exclusion of oral by documentary evidence.—When (i) the terms of a contract, grant, or other disposition of property have been reduced to the form of a document, or (ii) any matter is required by law to be in the form of a document—

(I) no evidence shall be given of the terms of such contract, grant, or disposition of property, of such matter, except (i) the document itself, or (ii) secondary evidence of its contents in cases in which secondary evidence would be admissible (s. 91);

(II) no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of (i) contradicting, (ii) vary [illegible] from, its terms (s. 92).

[illegible] by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved (s. 91, excep. 1).

(2) Wills admitted to probate in British India may be proved by the probate (s. 91, excep. 2).

The statement, in any document whatever, of a fact other than the terms of a contract, grant or disposition of property, or which is not required by law to be in writing, does not preclude proof of such fact by any other means (expln. 3).

To rule (II) there are six exceptions:—

(1) Any fact (*a*) which would invalidate any document or (*b*) which would entitle any person to any decree or order relating thereto, may be proved, *i.e.*, fraud, intimidation, illegality, failure of consideration, mistake in fact or law.

(2) Any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms may be proved.

(3) Any separate oral agreement, constituting a condition precedent to the attaching of any obligation under the document, may be proved.

(4) A subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved except where such contract or grant is required to be in writing or has been registered.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not inconsistent with its express terms.

(6) Any fact which shows in what manner the language of the document is related to existing facts may be proved.

Persons who are not parties to a document or their representatives in interest, may give evidence of facts tending to show a contemporaneous agreement varying the terms of the document (s. 99).

Construction of documents.—Sections 90—100 embody the rules as to the admissibility of extraneous evidence to interpret documents—

1. When the language is, on its face, ambiguous or defective, evidence cannot be given of facts which would show its meaning or supply its defects (s. 93)

2. When the language is plain in itself, and when it applies accurately to existing facts, evidence cannot be given to show that it was not meant to apply to such facts (s. 94).

3. When the language is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense (s. 95).

4. When the language is meant to apply to any one, but not to more than one, of several persons or things, evidence may be given to show to which of those persons or things it was intended to apply (s. 96).

5. When the language applies partly to one set of facts and partly to another, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply (s. 97).

6. Evidence as to the meaning of illegible, foreign, obsolete, technical, local and provincial expressions, abbreviations and words used in a peculiar sense may be given (s. 98).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

This Part deals with the production and effect of evidence. It comprises (*a*) the question of burden of proof; (*b*) the rules as to

who is to give evidence and under what circumstances; (c) the rules as to examination of witnesses; and (d) the effect of improper reception or rejection of evidence.

Chapter VII.—Burden of proof.—Whoever desires any Court to give judgment as to any legal right or liability dependent on facts, which he asserts, must prove that those facts exist. The burden of proof lies on that person who is bound to prove any fact (s. 101). The burden of proof in a suit or proceeding lies on that person who would fail if no evidence were given on either side (s 102).

Sections 103-113 lay down the rules as to burden of proof.—

1. The burden of proof as to any particular fact lies on that person who wishes the Court to believe it unless the law has provided that its proof shall lie on any particular person (s. 103).

2. The burden of proving any fact in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence (s. 104).

3. When a person is accused of an offence, the burden of proving that his case falls within any exception in the Penal Code or any other law lies on him (s. 105).

4. When a fact is especially within the knowledge of any person, the burden of proving it lies on him (s. 106).

5. When it is shown that a man was alive within thirty days, the burden of proving that he is dead is on the person who affirms it (s. 107).

6. When it is proved that a man has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive lies on the person who affirms it (s. 108).

7. When persons have acted as partners, or as landlord and tenant, or as principal and agent, the burden of proving that such relationship has ceased lies on the person who affirms it (s. 109).

8. When a person is in possession of any thing as owner, the burden of proving that he is not the owner is on the person who affirms that he is not the owner (s. 110).

9 When a person stands towards another in a position of active confidence, the burden of proving the good faith of any transaction between them lies on the person in active confidence (s. 111).

10 The fact that a person is born during a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, then unless non-access is proved, it shall be conclusive proof of his legitimacy (s. 112).

11. A notification in the *Gazette of India* of a cession of British territory to any Native State shall be conclusive proof that a valid cession took place at the date mentioned in the notification (s. 113).

Three sections deal with conclusive proof, *viz.*, ss. 41, 112, 113.

Section 114 lays down certain cases in which the Court may presume the existence of any fact which it thinks likely to have happened, regard being had (i) to the common course of natural events, (ii) human conduct, and (iii) public and private business, in their relation to the facts of the particular case (s. 114).

Chapter VIII.—Estoppel.—When one person has by his (*a*) declaration, (*b*) act, or (*c*) omission

(1) intentionally caused or permitted another person to believe a thing to be true, and (2) to act upon such belief,

neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative,

to deny the truth of that thing

The Evidence Act specially provides for the following estoppels—

1. A tenant of immovable property or person claiming through such tenant cannot, during the continuance of the tenancy, deny that the landlord had, at the beginning of the tenancy, a title to such property (s. 116).

2. A person, who came upon immovable property by the license of the person in possession thereof, cannot deny that the person so in possession had a title at the time when such license was given (*ibid*)

3. An acceptor of a bill of exchange cannot deny that the drawer had authority to draw or endorse (s 117)

But the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn (*ibid*, expln 1).

4 A bailee or licensee cannot deny that his bailor or licensor had, when the bailment or license commenced, authority to make such bailment or grant such license (*ibid*) But if a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor if he is sued by the bailor (*ibid*, expln. 2)

Chapter IX.—Witnesses.—All persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, (*a*) by tender years, (*b*) extreme old age, or (*c*) disease (s. 118). No particular number of witnesses is required for the proof of any fact (s. 125).

Dumb witness —A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible, e g., by writing or signs. Such writing must be written and the signs made in open Court (s. 119).

Husband and wife.—Husband or wife (i) of any party to a civil suit, or (ii) of the accused in criminal proceedings, is a compete[illegible] witness (s. 120).

Privileged communications.—Certain witnesses cannot be compelled to disclose certain facts. The law excludes this evidence on the ground of public policy

1. *Judge and Magistrate.*—A Judge or Magistrate shall not, except on the special order of some Court to which he is subordinate, be compelled to answer any questions (*a*) as to his own conduct, or (*b*) as to anything which came to his knowledge, as such Judge or Magistrate. He may be examined as to matters which occurred in his presence whilst he was so acting (s. 121).

2. *Communication during marriage.*—A person cannot be compelled to disclose any communications made to him or her during marriage by any person to whom he or she is or has been married. He will not be permitted to disclose any such communication unless the person who made it or his representative in interest consents—except (i) in suits between married persons, or (ii) proceedings in which one married person is prosecuted for a crime against the other (s. 122).

3. *Affairs of State.*—No person can give evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned (s. 123).

4. *Official communications.*—No public officer can be compelled to disclose communications made to him in official confidence, if public interest [illegible]

5. *Inform* [illegible]
officer cannot b [illegible]
as to the commission of an offence (s. 125).

6. **Professional communications.**—A barrister, attorney, or pleader, cannot disclose, without the client's consent,

(i) any communication made to him in the course and for the purpose of his employment;

(ii) the contents or condition of any document with which he became acquainted in the course and for the purpose of his employment, and

(iii) any advice given by him to his client (s. 126).

Such protection from disclosure does not extend to—

(1) any communication made in furtherance of any illegal purpose;

(2) any fact observed by a barrister, attorney or pleader, in the course of his employment, showing that a crime or fraud has been committed, since the commencement of his employment.

The principle of non-disclosure of professional communications applies to the clerks or servants of barristers, attorneys or pleaders (s. 127).

If a party to a suit gives evidence *at his own instance* he is not to be deemed thereby to have consented to a disclosure of professional communications by his legal adviser; and if he calls any

confined to the facts to which the witness testified on his examination-in-chief. The re-examination must be directed to the explanation of matters referred to in cross-examination. If new matter is introduced in re-examination, the adverse party may further cross-examine upon that matter (s. 138).

A person summoned to produce a document does not become a witness and cannot be cross-examined unless he is called as a witness (s. 139).

Witnesses to character may be cross-examined and re-examined (s. 140).

The Court may permit the person who calls a witness to put any questions to him, which might be put in cross-examination by the adverse party (s. 154). Such a witness is called a 'hostile witness.'

Leading questions.—Any questions suggesting the answer which the person putting it wishes or expects to receive is called a leading question (s. 141). Such questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court (s. 142).

The Court will permit such questions—

(1) as to matters which are (i) introductory, or (ii) undisputed, or (iii) already sufficiently proved (s. 142), or

(2) in cross-examination (s. 143)

Evidence as to matters in writing.—Section 144 enables the parties to put in force the provisions of ss. 91 and 92. Any witness may be asked whether any (*a*) contract, (*b*) grant, or (*c*) other disposition of property, as to which he is giving evidence, was not in writing and if he says that it was, the adverse party may object to such evidence being given until the document is produced or facts proved for the admission of secondary evidence. The same principle applies if a witness is about to make any statement as to the contents of a document which, in the opinion of the Court, ought to be produced (s. 144).

A witness may be cross-examined as to previous statements made by him and reduced into writing, without such writing being shown to him or proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him (s. 145).

Questions lawful in cross-examination.—When a witness is cross-examined he may be asked any questions which tend—

(1) to test his veracity;

(2) to discover who he is and what is his position in life; or

(3) to shake his credit, by injuring his character, although he answer to such questions might criminate him or expose him to a penalty or forfeiture (s. 146).

Questions as to character.—If a question in cross-examination is irrelevant, except in so far as it affects the credit of the witness by injuring his character, the Court may compel the witness to answer it or warn him that he is not obliged to answer it. The Court in deciding whether a particular question is proper or not will have regard to the following considerations —

(1) Such questions are *proper* if the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness

(2) Such questions are *improper*—

(i) if the imputation which they convey relates to matters so remote in time, or of such a character, that it would not affect, or affect in a slight degree, the opinion of the Court as to the credibility of the witness,

(ii) if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence (s. 148)

Such questions ought not to be asked unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded (s 149) If the Court thinks that any question was asked without reasonable grounds, it may, if it was asked by any barrister, attorney or pleader, report his conduct to the High Court or other authority to which he is subordinate (s 150).

The Court may draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable (s.148).

Questions that will be forbidden by the Court—The Court will forbid—

(1) any question which it regards as indecent or scandalous unless it refers to facts in issue or to matters necessary to be known in order to determine the facts in issue (s 151).

(2) any question which appears to the Court (1) to be intended to insult or annoy, or (2) to be offensive in form (s. 152.)

Answer to questions as to character cannot be contradicted.—When a witness answers any question which is relevant in so far as it shakes his credit, no evidence can be given to contradict him; but if he answe
false evidence (s. 153).
previous conviction if a
impeach his impartiality

Impeaching the credit of a witness.—The credit of a witness may be impeached by the adverse party, or, with the consent of the Court, by the party who calls him, in the following ways:—

(1) By the evidence of persons who testify that they believe him to be unworthy of credit.

(2) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give evidence.

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

(4) When a man is prosecuted for rape or attempt to ravish, it may be shewn that the prosecutrix was of immoral character (s. 155).

Evidence in corroboration.—When a witness whom it is intended to corroborate gives evidence of a relevant fact—

(i) he may be questioned as to the circumstances which he observed at or near to the time or place at which such relevant fact occurred (s. 156).

(ii) any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority competent to investigate the fact, may be proved (s. 157).

When a statement relevant under s. 32 or 33 is proved, evidence may be given (1) to contradict or corroborate it, or (2) to impeach or confirm the credit of the person by whom it was made, as if he had been called as a witness and had denied upon cross-examination the truth of the matter suggested (s. 158).

Refreshing memory.—A witness may refresh his memory

(1) by referring to any writing made by himself (i) at the time of the transaction concerning which he is questioned, or (ii) so soon afterwards that the transaction was fresh in his memory;

(2) by referring to any such writing made by another person and read by the witness and known by him to be correct, while his memory was still fresh;

(3) by reference to professional treatises if he is an expert.

A witness may, with the Court's permission, refer to a copy of any document which he might refer if it were produced, provided there is sufficient reason for the non-production of the original (s. 159). He may also testify to facts mentioned in any such document, although he has no recollection of them, if he is sure that the facts were correctly recorded in the document (s. 160). Any document to refresh memory must be shown to the adverse party, who may, if he pleases, cross-examine the witness upon it (s. 161).

Production of a document by a witness.—A witness summoned to produce a document must, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or admissibility. The validity of such objection will be decided by the Court. The Court may inspect the document unless it refers to matters of State or take evidence to determine on its admissibility (s. 162).

Notice to produce a document.—Notice to produce a document is necessary, except in the six cases provided in s. 66, in order to make secondary evidence of its contents admissible. When a party gives notice to produce a document, and it is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so (s. 163). If a party refuses to produce a document after notice, he cannot use it as evidence (i) without the consent of the other party, or (ii) the order of the Court (s. 164).

Court's power to put questions.—The Judge may, in order to ascertain relevant facts,

(1) ask any question (*a*) at any time, (*b*) of any witness or parties, (*c*) about relevant or irrelevant facts—though the judgment must be based on relevant facts only;

(2) order the production of any document or thing.

The parties cannot object to this course, nor can they cross-examine a witness upon any answer given in reply.

The Judge, however, cannot

(1) compel a witness to answer a question or produce a document which such witness would be entitled to refuse to answer or produce under ss. 121 to 132 at the instance of the adverse party,

(2) ask any question as to credit which it would be improper for any other person to ask under s. 148 or 149,

(3) dispense with primary evidence of any document, except where secondary evidence is admissible (s. 165).

Power of jury to put questions.—A juror or assessor may put any question to a witness, through or by leave of the Judge, which the Judge might put and which he considers proper (s. 166).

Chapter XI.—Improper admission or rejection of evidence.—The improper admission or rejection of evidence is not a ground

(*a*) for a reversal of the judgment, or

(*b*) for a new trial of the case,

if the Court thinks

(i) that independently of the evidence admitted, there was sufficient evidence to justify the decision, or

(ii) that if the rejected evidence had been received it ought not to have varied the decision (s. 167).

APPENDIX.

QUESTIONS.

CHAPTER I.

1. Explain briefly the structure of the Indian Evidence Act. What do you understand by Lord Brougham's observation "that the law of evidence is the *lex fori* which governs the Court ?" See Summary, p. 356, and comment on s. 1, p. 2.

2. To what extent are the provisions of the Indian Evidence Act applicable to (*a*) affidavits presented to any Court; (*b*) proceedings before an arbitrator. See s. 1, and comment thereon.

3. Define 'Relevant fact' 'Fact in issue,' 'Issue of fact,' 'Document,' 'Evidence,' 'Fact,' 'Proved,' 'Disproved,' 'Conclusive proof.' See s. 3.

CHAPTER II.

4. What is a "relevant fact ?" See s. 6.

5. When, and to what extent, is the conduct of a party to a proceeding relevant ? See s 8

6. Give two illustrations of facts which may be relevant under s. 11 only and not under any other section of the Evidence Act. See ills. to s. 11.

7. What is the necessity for s. 11 of the Evidence Act ? Does it not apparently make all facts relevant ? See comment on s. 11, pp. 29, 30.

8. *Res inter alios actæ* are generally relevant; state exceptions to the rule. See ss. 11, 14 and 41.

9. What facts are relevant when the existence of a right or custom is in question ? See s. 13

10. What facts are relevant when a right or custom is in question and when the question is whether an act was accidental or intentional ? See ss. 13 and 15.

11. State the principal classes of facts which are declared to be relevant by the Evidence Act. See Summary, p. 358.

12. "Relevancy and admissibility are not co-extensive terms." Give instances of and reasons for this rule. (Certain things are relevant under ss. 5-55, but they are not always admissible in evidence There may arise restrictions as to their admissibility under ss. 91-99, 115, 121-130).

13. Define a *statement* and *an admission*. Under what circumstances, and for what purposes, are statements and admis-

sions made by persons (whether parties to the suit or not), who are not called as witnesses, admissible in evidence? See ss. 17-21.

14. What are "admissions"? Who can make them, and when can they be used by and on behalf of persons making them? What is the evidentiary value of an admission? See ss 17, 18, 21 and 31.

15 Comment on the following—"Admissions cannot be proved by or on behalf of the person who makes them" See s. 21, exceptions

16. Comment on the following—"Oral admissions as to contents of a document are not relevant." See s 22

17. State the provisions of the Indian Evidence Act as to confessions. See ss 24-30

18. Distinguish between an admission and a confession and state the rules regarding the admissibility and probative value of each See comment on s 24, p 64

19. In what cases, if any, can the confession of an accused person be used against a co-accused? See s 30.

20. Comment on the following—"Admissions are not conclusive proof of the matters admitted, but they may operate as estoppel" See s 31

21 State the cases in which statements made by a person who is dead are themselves relevant facts. See s. 32.

22. What is a dying declaration. Enumerate the grounds on which dying declarations are admitted in evidence. If a person making a dying declaration happens to live, can the declaration be admitted in evidence? See comment on s 32 (1).

23 Give illustration of cases in which statements made by deceased persons are allowed to be received in evidence. See s. 32, cl. (1).

24 Are entries in books of account alone sufficient to charge any person with liability? When do they require corroboration as a matter of law, and when not? See s. 32.

25. Enumerate the cases in which evidence not taken by the Court trying the case can be put in? See s. 33.

26 Under what circumstances is a deposition of an absent witness admissible? See s 33.

27. What are the conditions under which an entry in an official book or register stating a fact in issue becomes a relevant fact? *What is the evidentiary value of an entry in a man's account-*book in support of his claim? See ss. 34, 35.

28. "Nemo debet bis vexari pro una et eadem causa." How is the principle expressed by this maxim discussed in the Indian Evidence Act? See s. 40.

29. How far, under what circumstances, and for what purposes, can previous judgments, orders and decrees be deemed relevant? See ss. 40-43.

30. In what cases are judgments nor *inter partes* admissible in evidence? See ss. 41-43.

31. Describe and distinguish the legal effects of judgments declared to be conclusive in subsequent trials by the Evidence Act. See s. 41.

32. Distinguish between a "judgment *in rem*" and a "judgment *in personam*" for the purposes of the Indian Evidence Act. Discuss the admissibility and effect of such judgments respectively as evidence. See comment on s. 41.

33. In what cases are the acts of third persons admitted as evidence of a transaction? Give instances. See ss. 10, 32, 41-43.

34. Can transactions between third parties ever be relevant for or against parties to a suit? If so, when? Illustrate your answer by an example. State the general law on the subject. See ss. 13, 41 and 42.

35. State upon what subjects the opinions of witnesses are admissible in evidence. See ss. 45-51.

36. How is a fact in reference to such opinion relevant when it is not otherwise relevant? See s. 46.

37. Distinguish between:—(*a*) expert evidence and ordinary evidence; (*b*) ambiguity and inaccuracy; (*c*) admissibility and relevancy, (*d*) disproved and not proved. See (*a*) s. 45; (*b*) s. 93; (*c*) comment on s 5; (*d*) s. 3.

38. When are the opinions of persons who are strangers to a proceeding relevant under the Evidence Act? What is the probative value of such evidence? See ss. 45 and 51.

39. What qualifications must a witness, speaking as to relationship, possess? See s. 48.

40. What are the rules with regard to the reception of évidence of character of (1) a witness, and (2) a party? See ss. 52-55 and 32, cl. (5).

41. How far is "character" relevant and admissible in evidence in (*a*) civil suits, (*b*) criminal cases. See ss. 52-55.

42. "In criminal proceedings, the fact that the accused person has a bad character is irrelevant." See s. 53.

43. State some of the more important provisions of the law of evidence which are peculiar to criminal trials and inapplicable to the trial of civil cases. Is there any difference as to the *effect* of evidence in civil and criminal proceedings? If so, what? See sections relating to confessions and character See comment on p. 10.

Chapter IV.

44. Explain fully the rule that oral evidence must, in al cases, be direct. Is tl ere any exception to the rule? Illustrate your answer by concrete examples. See s. 60.

45. "In determining the admissibility of evidence, the production of the best evidence should be exacted." Discuss the above proposition. See s. 60.

46. What is the meaning of 'hearsay evidence'? What are the reasons for not admitting 'hearsay' as evidence? See comment on s. 60, p. 153.

CHAPTER V.

47. What is meant by proving a document? See s. 61.

48. *Comment on the following.*—"Where a document is executed in counter-part each counter-part is primary evidence as against the parties executing it." See comment on s 62.

49. How may the contents of a document be proved? What is meant by secondary evidence? State the cases in which secondary evidence may be given to prove the contents of a document. See ss. 61, 63 and 65.

50. Mention all the cases in which secondary evidence of the existence, condition or contents of a document may be given? See ss 65 and 66

51. What are public documents and what are private documents according to the Indian Evidence Act? See ss. 74-76.

52. What are public documents, and how are they proved? See ss. 74 and 78.

53. When the genuineness of a letter is in dispute what are the various kinds of evidence that may be laid before the Court to prove the handwriting? See ss 45, 47 and 73.

54. Give five instances of (*a*) rebuttable, and (*b*) irrebuttable presumptions from the Indian Evidence Act. See ss. 79-85

55. State briefly the provisions of the Evidence Act with reference to (*a*) maps, charts, or plans; (*b*) finger impressions. See ss. 36, 45 and 83.

56. By the law of evidence certain things are presumed. Mention some of the principal presumptions derived from the common course of things. See ss. 79-80 and ills. to s. 114.

57. Give a brief analysis of the documents which the Court is bound to presume to be genuine or accurate. See ss. 79-90.

CHAPTER VI.

58. *What are the provisions to the* general rule enacted by the Evidence Act excluding evidence of oral agreements or statements in the case of written contracts, grants, and dispositions of property, and matters required by law to be reduced to the form of a document? See ss. 91 and 92.

59 State the exceptions to the rule that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from, the terms f a written instrument. See ss. 92 and 99.

60. When the terms of a contract have been reduced to writing, can oral evidence be given for construing the contract or ascertaining the intention of the parties to it? Give reasons for your answer. See ss. 92-99.

61. State the rules as to the exclusion and admission of evidence to explain or amend ambiguous documents. Explain and illustrate the maxim *falsa demonstratio non nocet?* See ss 93-98.

62. In what cases is oral evidence admissible to explain the contents of a document? See ss. 93-98.

CHAPTER VII.

63. What is "burden of proof"? Give the rules by which it is regulated. See ss 101-111.

64. What are the general principles regulating the burden of proof? Illustrate your answer by examples. See ss. 101-111.

65. Upon whom does the burden of proof as a general rule lie? What are its exceptions? See ss. 102-111.

66. Enumerate the instances in which the burden of proof is determined in particular cases not by the relation of the parties but by presumptions. See ss. 107-111.

67. State shortly the rules of the Indian Evidence Act, as to burden of proof, in the following matters.—(*a*) Whether a man is alive or dead; (*b*) Tenancy; (*c*) Ownership; (*d*) Legitimacy. See ss. 107-8, 109, 110 and 112.

68. Give instances of facts which are declared by law to be conclusive proof. See ss. 41, 112 and 113.

69 State fully the subject of presumptions as dealt with in the Indian Evidence Act. See ss. 79-90 and 112 and 113.

70. Comment on the following.—"A notification in the Gazette of India that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification." See comment on s. 113.

71. Mention the principal presumptions, derived from the common course of things, and give illustrations to show how such presumptions may be explained away in particular cases. See s. 114 and illustrations.

CHAPTER VIII.

72. Explain the doctrine of estoppel. What cases of estoppel by contract are provided by the Evidence Act? See s 115.

73. What are the three classes of estoppel according to English law, and how many kinds of these are recognised in the Indian Evidence Act? See comment on p. 261.

74. How far and under what circumstances are tenants and licensees permitted to deny the title of their landlord or licensor as the case may be? See ss. 116 and 117.

CHAPTER IX.

75. What constitutes incompetency to give evidence? See s. 118.

76. When can a witness be allowed to answer questions in writing? See s. 119.

77. What are privileged communications? State the circumstances under which the privilege can be claimed? See ss. 120-131.

78. State in detail the circumstances under which the Indian Evidence Act excuses witnesses from answering questions put to them in Court. See ss. 121-130.

79. What communications are witnesses not permitted or compelled to disclose? Compare the English and Indian law as to the admissibility of a wife's evidence for or against her husband in civil and criminal cases See s. 122 and comment thereon.

80. May a wife be compelled to give evidence against her husband in a civil or criminal case? See ss 120 and 122.

81. What professional communications between a party and his legal adviser are protected from disclosure? See s 126.

82. What privileges, if any, can be claimed by the following persons if called as witnesses—(1) Judges, (2) married persons; (3) policemen; (4) public officers, and (5) legal advisers? See ss. 121, 122, 124, 125 and 126.

83. What questions would a witness (neither professional nor official) be justified in refusing to answer? See ss 122, 130-32 and 148

84. Section 133 of the Evidence Act says "A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (*b*) to Sec 114 of the Evidence Act states: "A Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars"

Reconcile the above two propositions See comment on these two sections.

85. State the Indian and English law in respect of legality of convicting an accused person on the uncorroborated testimony of an accomplice. Cite cases illustrating the principles laid down by the Bombay High Court on the subject. See comment on ss. 114 and 133.

86. State briefly the provisions of the Indian Evidence Act with reference to (*a*) ancient documents; (*b*) production of title deeds by a witness; (*c*) telegraphic messages See ss. 88, 90, 130, 131.

CHAPTER X.

87. What is the meaning and object of cross-examination? What questions affecting the credit of a witness by injuring his

character are respectively proper and improper? See ss. 137 and 148.

88. What are the principal rules regarding the kind of questions that may be asked in examination-in-chief, cross-examination and re-examination? See ss. 138.

89. What is the nature and object of cross-examination and re-examination? See s. 142 and 146.

90. What difference is observed and allowed regarding the right of parties to a suit about putting "leading questions" to a witness? See ss. 141-143.

91. What course should you, as a pleader, adopt, if you wished to discredit a witness, by showing that he had made a contradictory deposition in another suit? See ss. 145, 155, cl. (3).

92. Is it open to a party to discredit his own witnesses, or to put leading questions to them? See ss. 142, 143, 154 and 155.

93. For what purposes and at whose instance are former statements of a witness under examination admissible under the Evidence Act? See ss. 145, 157, 160 and 161.

94. What is the object and scope of cross-examination? See ss. 146-148.

95. In what ways may the credit of a witness be impeached? See ss. 146, 153 and 155.

96. When a witness is under examination, (*a*) what questions and inquiries *may* be forbidden, and (*b*) what questions must be forbidden by the Court? See ss. 148-152.

97. When can the Court compel a witness to answer the questions intended to affect his credit by injuring his character? See s. 149.

98. In a civil case are there any restrictions on the questions which may be asked in cross-examination? Has the Judge power to exclude any questions? If so, in what cases? See ss. 148-150.

99 Under what circumstances can the Court interfere with the cross-examination of a witness? See ss. 148-152.

100. Can a prisoner's counsel cross-examine witnesses summoned by the Court or by a co-prisoner? See s. 153.

101. What evidence of a witness is liable to contradiction? To what other methods of lessening the value of his evidence can counsel have recourse? See ss. 146 (*b*), 153 and 155.

102. When may a party cross-examine his own witness? See s. 154.

103. Who is a hostile witness? See s. 154.

104. Enumerate the circumstances under which *expert* opinion is relevant, and state how such opinion may be ascertained. See ss. 45, 46 and 159.

105. What is meant by a witness 'refreshing his memory'? What documents may be used for this purpose? Can such documents be subsequently put in and made evidence in the action? If so, how, and by whom? See ss. 159-161.

106. What restrictions are imposed on the general power of a Judge to ask questions of a witness? See s. 165.

CHAPTER XI.

107. Comment on the following:—"The improper admission or rejection of evidence shall not be ground of itself for a new trial." See s. 167.

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CHAPTER XI.

107. Comment on the following:—"The improper admission or rejection of evidence shall not be ground of itself for a new trial." See s. 167.

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